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In the Supreme Court of the United States

OCTOBER TERM, 1937

NOS. 84 AND 85

ALABAMA POWER COMPANY, PETITIONER

v.

HAROLD L. ICKES, AS FEDERAL EMERGENCY ADMINISTRATOR OF PUBLIC WORKS, ET AL.

ALABAMA POWER COMPANY, PETITIONER

v.

HAROLD L. ICKES, AS FEDERAL EMERGENCY ADMINISTRATOR OF PUBLIC WORKS, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENT ADMINISTRATOR

OPINIONS BELOW

The opinion of the District Court appears in the record at I, 437. The opinion of the Court of Appeals, 91 F. (2d) 303, appears in the record at I, 509.

JURISDICTION

The petition was granted June 1, 1937. The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether petitioners, as holders of non-exclusive franchises for the generation and distribution of electric power, have standing to challenge the validity of proposed loans and grants of Federal funds to municipalities for the construction by them of electric distribution systems, the construction and operation of which are admittedly lawful undertakings of the municipalities.

2. If the first question is answered in the affirmative, then whether the loan and grant agreements are authorized by Title II of the National Industrial Recovery Act and by the Emergency Relief Appropriation Act of 1935; and whether that application of the statutes is in violation of the Federal Constitution.

STATUTES INVOLVED

In No. 84 the proposed loans and grants are to be made pursuant to Title II of the National Industrial Recovery Act, c. 90, 48 Stat. 200, as continued by Section 12 of the Emergency Relief Appropriation Act of 1935, c. 48, 49 Stat. 115. In No. 85 the proposed loans and grants are to be made pursuant to the Emergency Relief Appropriation Act of 1935. The statutes will be found in the Appendix, separately printed.

STATEMENT

A. THE BASIC FACTS

As originally brought, these were five suits in the District Court for the District of Columbia, consolidated for trial, to enjoin the making of loans and grants by the United States to ten municipalities to finance or aid in financing the construction of electric power distribution systems by those municipalities. The plantiffs were, respectively, the Texas Utilities Company, the Alabama Power Company (in two cases), the Oklahoma Utilities Company, and the Iowa City Light and Power Company. The defendants are the Federal Emergency Administrator of Public Works, as the principal defendant, and, as formal parties, certain of his subordinates, the Secretary of the Treasury, the Treasurer of the United States, and the Chief Disbursing Officer of the United States.

At a previous stage of the litigation, motions to dismiss the bills of complaint in four of the five cases (excluding Iowa City) were granted by the District Court. Plaintiffs appealed to the Court of Appeals for the District of Columbia, which on motion of the defendants remanded the causes to the District Court for the reason that the loan and grant agreements between the Government and the municipalities had been changed in material respects subsequent to the order of the District Court. All five cases were thereafter consolidated for trial before Chief Justice Wheat, who rendered decrees

dismissing the bills on the merits. On appeal to the Court of Appeals for the District of Columbia, the decrees of the lower court were affirmed.

The suits brought by the Texas Utilities Company, the Oklahoma Utilities Company, the Iowa City Light and Power Company, and by the Alabama Power Company insofar as it relates to the proposed loans and grants to the cities of Florence, Sheffield, and Tuscumbia, Alabama, are moot. The cases which remain are as follows:

1. *Alabama Power Company* v. *Ickes et al.*, No. 84, involving loan and grant to the city of *Decatur, Alabama.* The Bill of Complaint in this case appears at pp. 216–248 of Vol. I of the Record, and the answer of the defendants at pp. 250–259.

2. *Alabama Power Company* v. *Ickes et al.*, No. 85, involving loans and grants to the cities of *Hartselle, Guntersville, and Russellville, in Alabama.* The Bill of Complaint in this case appears at pp. 334–366 of Vol. I of the Record, and the answer of the defendants at pp. 368–377.

Each of the bills of complaint sought injunctive relief on the ground that the statutes authorizing the proposed loans and grants are unconstitutional, and that the loans and grants themselves are unauthorized by the statutes. The loan and grant involved in case No. 84 is proposed to be made under authority of Title II of the National Industrial Recovery Act, 48 Stat. 200, as continued

by Sec. 12 of the Emergency Relief Appropriation Act of 1935, 49 Stat. 115. The loans and grants involved in case No. 85 are proposed to be made under authority of the Emergency Relief Appropriation Act of 1935.

After an extensive trial, lasting seventeen days, the district court rendered an opinion holding that the statutes involved are constitutional, that the action contemplated by the respondents is authorized by the statute, and that the petitioner was entitled to raise these questions (R. Vol. I, 437–447). Thereafter, though no mention is made of it in petitioner's brief, the court entered comprehensive findings of fact and conclusions of law (R. Vol. I, 447–468, 468–472).

The decrees dismissing the bills on the merits were filed June 26, 1936 (R. Vol. I, 472). The cases were appealed to the Court of Appeals, and on May 10, 1937, that court affirmed the decrees of the District Court on the ground that petitioner was without standing to question the validity of the statutes or the action of the Administrator (R. Vol. I, 508–515).

Certain basic facts, as found by the trial judge, are not subject to controversy (pp. 5–14, *infra*).

Petitioner's franchises

Petitioner has no exclusive franchise in any of the cities. The non-exclusive franchise granted by the City of Decatur became effective on January 27, 1920, for a period of 30 years. The franchises

granted to the same Company by the towns of Hartselle, Guntersville, and Russellville are indeterminate, non-exclusive franchises (Fdg. 15, R. Vol. I, 451).

Authority of cities to build plants

All of the cities are authorized under state law to construct and operate municipal electric plants and distribution systems, and to issue bonds for the purpose of financing construction of such plants and to receive grants for that purpose (Fdg. 19, R. Vol. I, 452–453).

Applications of the cities for loans and grants

It was conceded by counsel for the petitioner, as stated in the opinion of the District Court, that not only do the cities have the legal power to build competing municipal plants, but that "prior to the enactment of the statutes involved, they had a desire to build such plants" (R. Vol. I, 438). In each of the cities involved, a public election was held to determine whether the city should erect a municipal power plant. In each instance the proposal carried by substantial majorities (Fdgs. 20–30, R. Vol. I, 453–457).

The loan and grant agreements

Each of the existing agreements, which are the subject matter of the present suits, is set out in full in the record as follows:

Decatur, R. Vol. I, 259–278;
Guntersville, R. Vol. I, 378–397;

Hartselle, R. Vol. I, 398–417;
Russellville, R. Vol. I, 417–436.

Each of the agreements is for a loan and grant. An examination of the contracts will indicate that the one with Decatur, entered into pursuant to the 1933 Act, provides for a grant in an amount not to exceed 30% of the cost of the labor and materials employed upon the project; those with the other cities, entered into pursuant to the 1935 Act, provide for a grant not to exceed 45% of the cost of the project.

An earlier agreement with the City of Decatur was executed on December 6, 1934 (R. Vol. I, 120–138). This agreement contained provisions requiring the city to enter into a contract with the Tennessee Valley Authority for the purchase of power as a condition precedent to receiving a loan and grant. This agreement was terminated on December 2, 1935 (R. Vol. I, 139), and on December 6, 1935, the existing contract was executed. The new contract contains no provision with respect to the purchase of power. The trial court found that, under the existing contracts, neither the United States nor any of the defendants has any right or power to designate the person or agency from whom the municipality must purchase its power, and that the provisions of earlier contracts containing such requirements were eliminated before any action was taken pursuant thereto by any of the municipalities (Fdg. 37, R. Vol. I, 463).

All of the existing contracts are substantially the same. They provide for the purchase by the United States of revenue bonds of the borrower which bear 4% interest per annum and mature serially. The detailed provisions of the contracts relate to the continued responsibility of the borrower, and its ability to complete the project, the filing of plans and specifications, the furnishing of information concerning progress of the work, and the carrying of insurance on the project. These provisions are of course designed to safeguard the security of the loans. The agreements also provide as conditions precedent to the making of loans and grants, that certain labor conditions be met by the cities in the construction (not the operation) of the plants. With respect to rates, the agreements contain the following provision: (For illustration, the agreement with the City of Decatur, Alabama, is cited.)

> 13. The Administrator and the Government shall have no rights or power of any kind with respect to the rates to be fixed or charged by the project, excepting only such rights as they may have as a holder of such bonds under the Constitution and laws of Alabama and the lawful proceedings of the Applicant, taken pursuant thereto, in authorizing the issuance of such bonds.
>
> 14. This offer is made with the express understanding that neither the loan nor the grant herein described is conditioned upon compliance by the Applicant with any con-

ditions not expressly set forth herein. There are no other agreements or understandings between the Applicant and the Government or any of its agencies in any way relating to said Project or to the financing or the construction thereof (R. I, 266).

The statute of Alabama under which the proposed bonds of the municipalities are to be issued (Act 107, approved April 6, 1933, Appendix, p. 52), authorizes a City to mortgage the plant or any part thereof, and also to pledge all or any part of the revenues derived from the operation of the plant, as security for the loan. The loan and grant agreement between the Government and each of the municipalities provides that the bonds shall be payable as to both principal and interest solely from and secured by a first pledge of the revenues derived from the operation of the plant after the deduction of reasonable operating and maintenances expenses. The Supreme Court of Alabama, in *Oppenheim* v. *City of Florence,* 229 Ala. 50, has held that under the statute above referred to a City may stipulate that the bonds shall be paid only from revenues, without, at the same time, giving a mortgage on the physical properties. As a result of this holding and of the terms of the agreements between the Government and the cities, there will be no right in the bondholders, in the event of default, to foreclose on the property of the municipalities or to require their sale or themselves to take them over and operate them.

In discussing the remedies of a bondholder, in the case above referred to, the Supreme Court of Alabama said (229 Ala. at 58):

> The covenants and agreements impose duties which may subject the city to mandatory proceedings for their enforcement or injunctive proceedings to prohibit their disregard and create a relation of trust in funds derived from the sale of the bonds and the operation of the plant traceable and enforceable in equity, when diverted, on the same principles which generally obtain in respect to such relief in equitable proceedings. No lien is created upon the new property itself.

Neither the United States nor any of the defendants has any power to control the operation of the projects after construction is completed (Fdg. 38, R. Vol. I, 463).

No attempt was made by the plaintiffs in any case, except with respect to Plainview, Texas, to prove that the loans were not reasonably secured and that the projects were not self-liquidating (Fdg. 42, R. Vol. I, 465). In the case of Plainview, Texas, which has become moot and is not before this Court, extensive testimony was presented by both sides on this question, and the District Court found that there was substantial evidence to support the determination of the Administrator that the project was self-liquidating and that the loan was reasonably secured (*Ibid.*).

Each of the projects herein involved has been approved by the Administrator and by the President of the United States (Fdg. 43, R. Vol. I, 465; II, 339–346; 355–361).

As required by the Emergency Relief Appropriation Act of 1935, the President has determined that in the case of the projects to be constructed in the cities of Hartselle, Russellville, and Guntersville, Alabama, with funds appropriated under that Act, at least 25% of the loan or grant or the aggregate thereof will be expended for work on each project (Fdg. 44, R. Vol. I, 465; II, 344–345, 358).

The Public Works Program and competitive electric projects

As of the date of the trial, a total of 7,957 projects, of many different types and extending into every county in the United States except three, had been approved by the Public Works Administration and funds allocated therefor. Of this number, 260 are electric power projects, only 85 (less than one-third) being located in places where privately owned electric facilities are now being operated, 175 being non-competitive. The amount allotted for all non-Federal P. W. A. projects is $1,222,636,961. The total allotted for the 85 competing electric projects is $58,768,811, representing but 1.1% of the total number of allotments and 4.8% of the total amount of allotments (Fdg. 40, R. Vol. I, 464–465; II, 539). These figures include water power projects and others which are only in part electric projects.

A fair and accurate picture of the extent of the Public Works program can be obtained by reference to the testimony of the Administrator during the hearings on the First Deficiency Appropriation Bill, 1936, H. R. 12624, 74th Congress, 2nd Session, before a Sub-Committee of the Senate Committee on Appropriations, May 18, 1936. In that testimony the Administrator submitted a schedule of non-Federal projects theretofore approved, classified according to type. The classification of such projects as there given is as follows (pp. 15–16):

Type of Project	Number of projects
Grand total all types	8,010
Street and highways	741
Roads and highways	352
Streets	345
Grade crossing elimination	12
Miscellaneous	32
Utilities	2,742
Sewer systems	883
Sewage disposal plants	460
Sanitary sewers	275
Storm sewers	80
Combined sewers	68
Sewer and water	115
Water systems	1,497
Water mains	177
Filtration plants	59
Reservoirs	119
Complete waterworks	1,142
Garbage and rubbish disposal	23
Gas plants	23
Electric power excluding water power	134
Electric distribution systems	27
Power construction	107
Miscellaneous	67
Buildings	3,996
Educational buildings	3,074
Secondary schools	2,789
Colleges and universities	230
Other educational institutions	21
Public libraries	34

Type of Project	Number of projects
Buildings—Continued.	
Municipal auditoriums and armories	52
Courthouses and city halls	239
Hospitals and institutions	363
Penal institutions	85
Social, recreational buildings	27
Residential buildings	6
Office and administrative buildings	31
Warehouses, laboratories, shops, etc	26
Housing projects	7
Miscellaneous	86
Flood control, water power, reclamation	75
Dams and canals	27
Channel rectifications, levees, etc	7
Storage reservoirs	3
Water-power development	10
Miscellaneous	28
Water navigation aids	18
Dams and canals	3
Channel rectifications, levees, etc	6
Other navigation aids	9
Engineering structures	221
Bridges and viaducts	166
Wharves, piers, docks	33
Subways and tunnels	5
Other	17
Aviation	9
Recreational	54
Miscellaneous	122
Railroads	32

As to the above facts, there was no dispute in the evidence. The only conflict in the evidence related to the purpose or policy of the Administrator in making the loans and grants and whether construction of the projects was brought about as a result of solicitation or inducement by the Public Works Administration. (The conflict in the evidence as to the reasonable security of the Plainview, Texas, loan is no longer of consequence, since that case has become moot.)

B. THE ALLEGED IMPROPER PURPOSE OF THE ADMINISTRATOR

The size of the record is due largely to the testimony introduced or offered by petitioner with respect to the alleged policy or purpose or motive of the Administrator in making the loans and grants. That, however, is a wholly immaterial issue. The relevant issues, in addition to the standing of petitioner to complain, are whether the statutes are constitutional and whether the proposed loans and grants are authorized by the statutes. In the first place, the motives or purposes of a defendant officer are legally irrelevant, for obviously, they cannot affect the constitutional validity of the statutes themselves nor can they serve to invalidate his acts which, viewed objectively, fully conform with the statutes. See the discussion, *infra,* pp. 171 to 180. In the second place, the motives or purposes are factually irrelevant in the cases at bar, for petitioner has properly recognized (Br., p. 69) that regardless of defendant's purpose the inevitable and foreseeable consequence of making the loan and grant agreements will be the same; that is, the financial loss to the petitioner will ensue if the Administrator has fully complied with the statutes, regardless of the propriety of his motives or intentions.[1]

[1] In the brief of the petitioner in the *Duke Power Co.* case this position is urged even more emphatically at pages 53, 63, 73, 74. Thus at pages 63–64 it is said: "*The necessary and inevitable effect* of financing the establishment of the pro-

In that view it is manifest that the motives, purposes, and intentions of the defendant become irrelevant, for petitioner's position is merely that the validity of defendant's acts must be judged with reference to their necessary foreseeable effects upon petitioner's business.

Nevertheless, petitioner devotes so considerable a part of its brief to a discussion of the alleged purpose and intention, plan, or motive of the Administrator (sometimes called "criterion") in an attempt to show that the Administrator made the loans and grants to foster municipal competition for the purpose of reducing power rates to consumers, that it is desirable to show that the assertions made with respect to the Administrator's purposes and intentions are unfounded in fact. It is our position that even if the Court should consider the policies or purposes of the Administrator relevant to this controversy, the evidence fully sustains the finding of the trial court that the defendants were not "motivated by a desire to cause injury or financial loss to the plaintiffs or to regulate their rates, or electric rates generally, or to foster municipal ownership of utilities" (Finding 35, R. Vol. 1, 462–463).

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posed plant, as a Federal public works project, *will be to lower and control power rates* in the territory in which the Federally subsidized and controlled plant will operate." At page 73 it is said that the injury to petitioner "*will be the inevitable result of the act of the Federal Administrator in authorizing the project*," and that the effect upon petitioner's business was "reasonably foreseeable." [Italics supplied.]

Out of a trial that lasted seventeen days, with dozens of witnesses and several hundred exhibits, petitioner has selected portions of the testimony of two witnesses and of one exhibit on which it bases its claim that the Administrator acted pursuant to an improper power policy. The evidence relied upon by petitioner consists of (1) P. W. A. Press Release No. 989, dated September 27, 1934 (Plaintiff's Exhibit 33), (2) the testimony of a United Press correspondent named Harkness and (3) the testimony of Otto M. Rau, formerly a member of the Electric Power Board of Review—a subordinate body with only advisory powers.

Press Release No. 989

With respect to Press Release No. 989, dated September 27, 1934 (R. II, 253–255), the Administrator testified that, standing alone, it did not represent the policy of the Public Works Administration with respect to municipal power projects. When this release was issued, the Administrator's policy in this regard had not yet crystallized. As he stated, the policy was an evolving one (R. II, 541.) In the response to a question on cross-examination the Administrator testified (in May 1936):

> I do not think that is an accurate statement of what our policy finally crystallized into. We were working out this thing as we went along; and that statement taken in connection with a sentence in the concluding paragraph "We believe it is for the munici-

> pal applicant to determine whether or not it desires to compete with privately owned utilities" that in the final analysis, was our policy. The statement just read would be in error if taken by itself; yes. The whole thing is to be considered together as a statement of policy (R. Vol. II, 525).

He further stated (R. II, 508):

> That press release was not designed as an administrative order. It was merely run-of-the-mine publicity.

As a reading of the release will show, it was obviously intended to answer criticisms of two kinds: (1) objections made by power companies to Federal aid for municipal power projects, and (2) complaints from those municipalities whose applications for such aid had been rejected. The release makes the following explanations in answer to such criticisms:

(a) The fundamental policy of the Administrator was *to leave to the States and their municipalities, as a matter of local concern, the question whether the construction of competitive power plants was desirable.*

(b) If a power company reduced its rates, with the consequence that the municipality could not earn sufficient revenues to make the loan secure, then the application of the municipality would be rejected. If, however, such a reduction of rates by a power company appeared to be only temporary, then that factor would be disregarded.

(c) Experience has shown that in many instances power companies, by lowering their rates, have earned increased profits.

(d) A rejection by the Public Works Administration of an application for a loan to construct a municipal plant on the ground that the existing utility had lowered its rates was not without collateral advantages to the city.

(e) *The Public Works Administration would not relax its requirements to aid the construction of power projects;* they were required to meet "qualifications necessary for public works projects" (R. II, 253–255).

While a selected portion of the Press Release, taken from its context, might be subject to a different construction, we submit that the release, read as a whole, is not inconsistent with the finding of the trial court as to the policies and purposes of the Administrator.

Testimony of Harkness

Petitioner quotes (pp. 11–12) a part of the testimony of their witness, Mr. Harkness, a newspaper correspondent, as to what occurred at the Administrator's press conference on December 21, 1934, with reference to the allotment to Iowa City. The remainder of the witness Harkness' testimony, as well as his testimony on cross-examination, omitted by petitioner, shows conclusively that petitioner has drawn improper inferences from a portion of Mr. Harkness' testimony. When to the

extract quoted in petitioner's brief the following is added:

> I attended a press conference about August 20, 1935, at which Mr. Ickes announced the loan and grant which he made to Iowa City. At that conference he said this: that municipalities in some instances could afford to pay something to have private utilities out of their city and not meddle in politics and government. As I remember it, he did not say that specifically regarding Iowa City. He said that the City of Chicago could well have afforded to have paid something to Mr. Insull—Could have afforded to have paid something to keep him in Greece, to have built him an acropolis (R. II, 362). * * *
>
> Well, Mr. Ickes has always, according to my impressions from what he has said, held the ability of the project to be self-liquidating, one of the prime requirements of any project (R. II, 362).

it no longer appears from the testimony of this witness that the purpose of the Public Works Administration "power policy" was to regulate intrastate rates.

Testimony of Rau

Petitioner also quotes from the testimony of its witness, Otto M. Rau, formerly one of three members of the Electric Power Board of Review but no longer with the Government at the time of the trial. This Board had been created by a written order of the Administrator dated May 9, 1934 (R. II, 251), which shows by its terms that the Board

was established solely to gather information and give advice to the Administrator given by his other subordinates, the three regular examining divisions of the Public Works Administration (Engineering, Finance, and Legal). The Board's functions were not only purely advisory but were limited to power projects, the Board having been created because applications relating to such projects had been exceptionally retarded (R. Vol. II, 250). The Board was given no power to formulate policies or itself to take any action whatever in rejecting or approving proposed projects, that function having been reserved by the Administrator to himself. The trial judge found that the Board was empowered only to obtain information and to make advisory reports to the Administrator (Fdg. 33, R. I, 462). As the other subordinates of the Administrator advised him regarding other aspects of the proposed projects, the Board restricted itself primarily to a consideration of rates.

The Board was dissolved by written order of the Administrator on March 16, 1935, some ten months after its creation, because the Administrator was not satisfied with the way in which it was functioning (R. Vol. II, 508). The Administrator testified (R. Vol. II, 508):

> Under the order dated May 9, 1934 (Plaintiffs' Exhibit No. 32), an Electric Power Board of Review was set up to be advisory to the Administrator with particular reference to applications which had not been approved by the three reviewing

> divisions. Its authority was never enlarged. It had no power to formulate policies. I never authorized it to make determinations as to action to be taken by me or anyone for me. The Board was dissolved March 16, 1935. I was not satisfied with the way it was functioning. It seemed to me to have taken unto itself powers which it had never been intended it should have. I so admonished the Board.

Petitioner correctly points out that Mr. Rau was interested in the lower rates which local utility companies stated they intended to put into effect. Much is made of the fact that Mr. Rau and the Board were not interested in the amount of employment which a proposed project would create, in the effect of municipal competition on surrounding towns and country communities, or in engineering testimony as to the economic features of a proposed project. It is obvious that Mr. Rau was interested only in the utility companies' rates because he was hired as a rate expert by the Administrator (R. II, 244), and he had no authority to consider any other feature of a pending application. But the fact that Mr. Rau or the Electric Power Board of Review was not interested in the amount of employment to be created by a project, or in any other particular feature of a pending application, does not mean that these matters were not carefully considered by the Administrator or by the persons charged with the responsibility of examining into them and advising him with re-

spect thereto. Mr. Rau's basic function was to advise the Administrator with regard to the ability of a municipality to repay a loan in a case where the utility business in a community would be divided between the municipality and a competing privately owned company. Manifestly, the rate presently charged, and any reduction of rates contemplated by the privately owned company, were matters of prime importance to Mr. Rau in performing the functions assigned him.

The only occasions on which the Public Works Administration was interested in rates of local utility companies, and the reason for the interest on such occasions, were concisely put by the Administrator in the following testimony:

> Wherever the P. W. A. were proposing to make a grant only to aid in financing municipal power projects, and no loan whatever, I did take into account the rates to be charged by the city and the competing private companies. Also, where money was lent on general obligation bonds to a *city of good credit,* P. W. A. was not concerned about rates. But where money lent was evidenced by *revenue bonds,* then P. W. A. did concern itself with the rates to be charged by the city and by the competing companies for the purpose of being assured that the rates charged would yield sufficient revenue to operate the plant, take care of overhead, and leave a surplus to take care of the loan (R. II, 507). [Italics supplied.]

It thus appears that in cases where an application was filed with the Public Works Administration for a grant, without a loan, in aid of a municipal project, the rates to be charged for the services of the proposed project were not taken into consideration in approving or disapproving the application. That was true whether the project was a waterworks, sewage-disposal system, bridge, or power project. As the evidence shows, even in a case where the project would compete with an existing privately owned utility, if the application was for a grant only, the Administrator did not concern himself with the rates which would be charged by the applicant or by a competing privately owned company.

The foregoing facts must be kept in mind in considering the testimony of Mr. Rau, one of the members of the Electric Power Board of Review. He testified that, soon after its organization, the Board attempted to work out a definite policy with regard to municipal electric projects. The Board discussed the question of "social desirability" which was interpreted to mean that if the cost of service to consumers from the project would be lower than under existing conditions, the project was considered desirable from a social standpoint (R. Vol. II, 252–253). He further testified that in conversations with representatives of utility companies, he had advised them that if a lower rate were proposed by the utility, which affected the

earnings of the proposed plant, so that it would not be self-liquidating, the project would not be approved.

It is submitted that the fair inference from all the testimony of this witness is that rates were considered by the Board primarily with regard to the question of reasonableness of the security for the loan. It is, of course, clear that if the municipal rates were higher than those of the private utility, the municipal plant would probably not procure any patronage, and the loan could not be repaid. At times this general question was referred to with the connotation "social desirability." But an analysis of the evidence clearly indicates that this was merely another way of saying that if the proposed municipal rate were higher than the rate the utility company put into effect, the project would not be approved. Since the rate question had to be considered in any event, what it was called, whether "social desirability" or something else, is obviously immaterial.

But if the testimony of Harkness and Rau, and Press Release No. 989, left any doubt as to the policy of the Public Works Administration with respect to power projects, that doubt is set at rest by the testimony of the Administrator quoted *supra*, p. 22.

Petitioner's brief creates the impression that all the things said and done by any members of the Electric Power Board of Review out of the pres-

ence of the Administrator were known to, authorized by, and acquiesced in by the Administrator. But the evidence shows that such was not the fact, and that, not long before the Board was dissolved, the Administrator became aware of the fact that the Board was exceeding its purely advisory functions, and accordingly strictly admonished it to stay within the limited bounds he had set for it. On January 30, 1935, the Administrator wrote a memorandum to Mr. Hunt, Chairman of the Board, which appears as Defendant's Exhibit 11, (R. Vol. II, 511). This memorandum is as follows:

> On June 20, last, a P. W. A. allocation was made on Docket No. 3412 for a power plant for the Village of Hiram, Ohio. This allotment was approved by the President on June 27. Subsequently the loan agreement was executed, both by the Village and myself, and apparently all requirements for putting through this loan have been complied with.
>
> Meanwhile, it appears that on December 18 you wrote to the Village recommending the withdrawal of the application. This was without my knowledge and in spite of an order that I issued several months ago to the effect that no one on the staff had the power to overrule the President.
>
> In setting up the Electric Power Board of Review, it was my thought that it should pass upon power projects and report to me

> in case of disagreement with the action taken by the P. W. A. staff. I never for a moment supposed that I was creating a body that, without consulting me, would overrule not only me, but the President, and assume the right of direct negotiation with the municipalities involved.
>
> I would be glad to have you submit to me any facts which you think would make it my duty to rescind this allotment. *In the future the powers of the Electric Power Board of Review will be strictly confined to what I originally intended them to be, namely, the review of power projects and the making of reports and recommendations to me for my decision.* [Italics supplied.]

Nor is there any substance in the contention that special attention was given to applications for publicly owned power plants. This argument is refuted by the testimony of the Administrator, as well as by the testimony of witness Rau. The Administrator testified (R. II, 512):

> My order dated July 31, 1935, Plaintiffs' Exhibit 144, created the Power Division. I had abolished the Power Board of Review, but still felt the need of some division in P. W. A. that would be charged with particular responsibility with respect to power applications, so I set up the new Division.
>
> Referring to orders in evidence directing that preference should be given by state officers to the examination of municipal power projects, I felt that, whether or not there had been some clever sabotaging in my

> own organization on power applications, they had not had a fair break. They had been retarded for one reason or another, and it was to bring them up to a parity with respect to time with other applications that I issued that order.

And Rau testified that in his opinion the reason he had been appointed to the Electric Power Board of Review was (R. II, 250):

> No doubt the creation of my position there was due to the fact that all of the other classes of projects, such things as bridges, sewers, and waterworks, buildings and such things, would go through with reasonable promptness, while the municipal electric projects were lagging.

It thus clearly appears that, regardless of any inference that may be drawn from the testimony of Mr. Rau and the other witnesses as to the improper policy of the Electric Power Board of Review in handling of power projects, such policy is not attributable to the Administrator. If the testimony of the Administrator as to his policy and the testimony of his advisory subordinates as to their policy can be considered as at all in conflict, clearly the testimony of the Administrator should prevail.[3]

The Administrator's testimony as to his policy, referred to above, is further corroborated by his

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[3] See further, as to the limited authority of Hunt and Rau, the Government's brief in the *Duke* case, No. 397. In that case additional evidence was received concerning the Electric Power Board of Review and its functions.

report to the Senate (73d Congress, 2d Session, Senate Doc. 167, defendant's exhibit 70), wherein he states:

> The fundamental purpose of the Public Works Administration is to relieve unemployment and to increase purchasing power through the construction of useful public works, thereby increasing the consumption of goods and also providing employment in the capital goods industry.

The testimony of the Administrator as to the policy of the Public Works Administration with respect to municipal power projects is clear and unequivocal. It is corroborated by his memorandum of January 30, 1935, to Mr. Hunt with respect to the Hiram, Ohio, application. It is further corroborated by his reports to Congress. None of the evidence adduced by the petitioner at the trial, fairly construed, contradicts the testimony of the Administrator in any way. Considering all the evidence in the case, it is submitted that the trial judge was eminently correct in finding as he did (Finding 35, R. I. 463) that

> there was and is no conspiracy between any of the defendants and any other person, nor is there any other effort on the part of any of the defendants to, nor are their actions motivated by a desire to, cause injury or financial loss to the plaintiffs, or to regulate their rates, or electric rates generally, or to foster municipal ownership of utilities.

Alleged Inducement

On the question of inducement, the trial court found as follows: (Finding 35, R. I, 462):

> The determination of whether municipal competition with privately owned utilities, or the elimination of competition by privately owned utilities where their franchises had expired, was desirable, was made by the cities involved and not by P. W. A.
>
> Each of the municipalities involved in this suit determined to enter into the electric distribution business of its own free will. There was no solicitation or coercion on the part of any of the defendants, their agents or subordinates.

This finding, too, is amply sustained by the evidence. The Administrator testified, in response to a question by the Court (R. II, 541):

> We in no case stimulated applications. By stimulate I mean direct solicitation for particular projects at particular times. Of course we did hold out to the country that this money had been voted for this purpose. If it had been one of our major policies, instead of having comparatively few municipal power projects in number, we would have had a great many. Our policy from the beginning, without variation—although, as I say, it was an evolving policy—in the final analysis, we always felt that primarily it was up to the municipality to determine what it wanted. We did not inquire into

> the motive of the municipality, any more than we did when they wanted a library.

Mayor Glenn of Florence, Alabama, called as a witness by petitioner, testified that the City of Florence had been interested in municipal ownership since 1927. An application for a loan and grant was filed with the Public Works Administration on November 20, 1933. The Mayor testified (R. II, 142):

> No one in P. W. A. asked me to file this application. And the work was not greatly expedited by P. W. A. I had to bring Congressional and Senatorial pressure, and every other sort of pressure on P. W. A. to get them to do anything. Nobody urged me to make the application except the citizens. They voted about 14½ to 1 to go into the power business, and I was their servant, a public official, and had been attempting to get them into the power business.

Mayor Martin, of Iowa City, testified that Iowa City filed its application of its own free will and accord, and that the Public Works Administration did not ask or solicit or suggest that the City build a municipal electric light plant (R. Vol. II, 475). Similar testimony as to the Plainview, Texas, application was given by the witness Dysart, a member of the City Council of Plainview (R. Vol. II, 490). Officials of each of the Alabama cities whose allotments are involved in these suits were called as witnesses on behalf of petitioner, and not one of them indicated or suggested that their applications were instigated by the Public Works Admin-

istration. In fact, it was conceded by counsel for petitioner that each of the cities involved in these suits had a desire to build a municipal electric plant prior to the enactment of the statute creating the Public Works Administration (R. I, 438). And it is noteworthy that the legislature of Alabama authorized the borrowing of Federal funds for these projects prior to the establishment of the Public Works Administration; the Alabama statute refers in particular to the Reconstruction Finance Corporation. See Appendix, p. 54.

In the face of this overwhelming array of evidence petitioner is driven to the position that the mere enactment of the statutes authorizing the making of loans and grants to municipalities for public works projects, and the public announcement thereof, constituted an improper inducement to the local communities, in that the cities were thereby stimulated to engage in public construction they would not otherwise have undertaken. But this argument completely overlooks the fact that the municipality was absolutely free to select any type of public works project it desired. Any one of the cities involved in the cases at bar, had it so chosen, could have received, as other cities did, financial aid for the construction of schools, parks, hospitals, sewers, libraries, swimming pools, bridges, warehouses, tunnels, docks, markets, canals, viaducts, waterworks, auditoriums, and so forth. That the greatest percentage of construction consisted of the types listed above is indicated by the fact that but

1.1 per cent of the total number and 4.8 per cent of the total amount of allotments were for competing electric projects (Finding 40, R. I, 464–465).

No effort whatever was made by the Administrator to influence the determination by the cities of their choice of the kind of project for which they sought such aid. That determination was left entirely to the States and their cities. There is not a syllable of evidence to the effect that the Administrator made any special effort to bring about the construction of competitive municipally owned power projects. The desire of the particular cities whose projects are involved in the cases at bar to build competitive power plants, as above noted, preexisted the federal statutes involved in these cases and ante-dated the appointment of the defendant or anyone else as Administrator. And the determination to build such plants and to seek financial aid from the Administrator for such purpose was entirely local.

"Social Desirability"

Petitioner refers to the use of the test of "social desirability." The Administrator testified at some length with respect thereto (R. II, 514, 515, 516), stating that the phrase savored "of a general benediction at the end of a speech or a sermon."

The Administrator's testimony shows that many elements were taken into consideration in determining the social desirability or undesirability of a project. If the project would put men to work

on the construction of a municipal project, its social desirability was presumed. The community "sat as a jury" and decided whether the project would be socially desirable and the Administrator would "not attempt to overturn their finding" in the absence of conclusive proof to the contrary (R. II, 516). The Administrator would not approve a project if it was a mere makeshift to supply work (R. V. II, 516). The utmost, then, that can be said by petitioner is the following: (1) The Administrator desired to avoid mere make-work construction. That attitude was expressed by the vague phrase "social desirability", as it had been used as early as July 1933, in Circular No. 1, explaining the public works program (R. II, 363, 373). (2) And that attitude was applicable to all kinds of projects—bridges, schools, waterworks, etc., etc., and not merely to power plants. (3) That vague concept of social desirability was a *negative concept*. In other words, it was not the policy to *give* Federal financial aid to projects *because they were socially desirable* (that aid being given in order to increase employment quickly), but to *withhold such aid*, even to a project that would give employment quickly, *if the project was socially not desirable*. That is to say, social desirability was not one of the *positive* aims of the Administrator; he merely, at most, *rejected* certain applications because the projects were *not* socially desirable. (4) If the local community applied for Federal financial aid

for the construction of a project, it was presumed that the project met that vague negative test of social desirability. And that, again, was true of all kinds of projects and not merely of power projects (R. II, 516–517). If, however, someone in the local community protested that the community had erred with respect to the social desirability of the project, the Administrator would give attention to the protest. In the case of power projects, the protest usually came from a power company, and was generally on the ground that the project was not socially desirable because the rates would not be lower than those of the power company. In such circumstances, at some times, some heed was given to that kind of protest. But that merely meant, at most, that although a project would increase employment quickly and met all of the other requirements of the Federal statute, Federal aid would not be given therefor if the project was not socially desirable. In short, so far as municipal power projects were concerned, the Administrator did not make the loans and grants *in order* to reduce rates, but at some times, *when power companies protested,* he *withheld a loan or grant* because there would be no lowering of rates.

The Administrator testified that the policy on that subject was an evolving one, and the foregoing describes the most extreme version of what at one time may have been his attitude. But when that attitude is expressed in its most emphatic terms,

it comes very far from showing that the Administrator was acting *in order to* bring about lower rates in the local communities, but only that he sometimes refused to give Federal aid to a municipal power project, on the protest of a power company, because the project would not lead to a lowering of rates.

The Administrator testified that his purpose in making allotments for projects which happened to be competitive was always to increase employment quickly as required by the statute, and that considerations such as the benefit to the local community from reduction of rates were "only incidental and collateral" (R. II, p. 542).[3]

Miscellaneous Items of Excluded Evidence

Petitioner (p. 12, footnote) refers to a circular of instructions by Colonel Waite, Deputy Administrator, dated November 8, 1933, which referred to setting up publicly owned utilities as yardsticks. This circular was offered in evidence by petitioner (R. II, 392–393) and excluded (R. II, 394) and no error has been assigned in this court because of that ruling. Since, however, it was admitted in

[3] Of course, as above shown (pp. 21–23), quite aside from such consideration given the rates on the protest of a power company, the Administrator properly considered the prospective rates of a municipal project where the loan was to be evidenced by revenue bonds payable out of the revenues of the project or where the city's general finances were not in good condition.

evidence in the *Duke Power Co.* case, it may be well to discuss it: It is to be noted that petitioner made no effort whatever to prove the authority of Colonel Waite to issue such a memorandum or that it was ever approved by the Administrator. The specific authority of a government officer is not to be presumed. The fact that Colonel Waite was called "Deputy Administrator" indicates nothing as to his authority. The only evidence offered by plaintiffs as to Colonel Waite's authority consists of the following testimony by Mr. Wheeler, called as a witness by plaintiffs (R. Vol. II, pp. 314, 318):

> In 1933 and 1934 Colonel Waite was Deputy Administrator. The Deputy Administrator was the assistant to the Administrator. * * *. I do not know of my own knowledge the scope of the duty of the Deputy Administrator.

Significantly, when the Administrator was subsequently on the witness stand, the petitioner asked him nothing whatsoever as to Colonel Waite's authority. [And the same was true in the *Duke* case, where there was no evidence to show the scope of his authority.]

Petitioner in the court below made many assignments of error as to other excluded items of testimony offered by it. Those assignments were not preserved in the cases as now before this Court. See "Specification of Errors," petitioner's Brief, page 14. Therefore there was and is no occasion for respondents to rebut or explain those items.

Nevertheless, petitioner relies in its brief upon such excluded testimony:

(1) At page 12 of petitioner's brief, footnote, there is quoted a portion of a press release by Director Lilienthal of the Tennessee Valley Authority, referring to the policies and purposes of that Authority. This press release was offered by petitioners (R. Vol. II, 416) as Exhibit 175 for identification, but was not admitted in evidence by the trial court (R. 419–420).

(2) At page 12, footnote, reference is made to an article in a magazine by Administrator Ickes, which the trial court excluded (R. II, 394–395).

(3) Petitioner (Brief, p. 7) refers to the exclusion by the trial judge of the reports or recommendations of the examining divisions of the Public Works Administration. Error was assigned to that exclusion in the Court of Appeals (R. I, 488), but that error was not preserved in the cases that stand before this Court (See petitioner's "Specification of Errors," brief, p. 14). The trial judge excluded that evidence as immaterial on the ground set forth in its finding 33, R. 462, to the effect that the reports were made by mere subordinates of the Administrator, who had merely an advisory function. See *U. S.* v. *Fox River Butter Co.*, 61 Treas. Dec. 1047, certiorari denied, 287 U. S. 628; *Baltimore & Ohio Ry. Co.* v. *United States*, 298 U. S. 349. 370–371.

The charge that the Administrator rejected applications for other types of projects in the Alabama cities and singled out the power projects

As the evidence shows (see *supra*, pp 29 to 31), the determination as to what projects should be applied for by States and cities was left to the States and cities themselves, and no effort was made by the Administrator to induce the making of applications for power projects, competitive or otherwise, or to favor their approval as against other types of projects. Recognizing that these facts undermine its contention as to the Administrator's purposes and motives and policy, petitioner seeks to destroy the effect of that evidence by making an assertion (Brief, pp. 61–62) not made in the courts below, that the Alabama cities and adjacent cities and counties had applied to the Administrator for loans and grants for other types of projects (such as schools, jails, cemeteries, and waterworks), and that allotments based on those applications had for no good reason been withheld at the very time that the Administrator made the allotments for the power projects to the cities involved in the case at bar.

Petitioner has listed certain non-power projects in Alabama contained in reports of the Administrator made to Congress (and introduced as exhibits in the record) which showed that those projects were pending and had not yet been acted upon; and petitioner, on that basis, makes the statement—supported by nothing in the record—

that those projects had not been approved, although presumably valid, while the Alabama power projects were approved (Brief, pp. 61–62). Since petitioner has travelled outside of the record in making that statement we feel justified in noting the following facts, taken in part from the record and in part from the files of the Public Works Administration:

(a) The total allotments for power projects in Alabama to date (including those involved in the case at bar) amount to approximately $2,300,000. The record shows that prior to March 22, 1934, there was an allotment to Birmingham, Alabama (which is in the general region in which the cities in question are located), for a bridge, in the amount of $2,000,000 (Defendant's Exhibit 10, p. 126). The Public Works Administration files show that that allotment was made November 14, 1933. Subsequently, the City of Birmingham amended its application and asked instead for $1,419,000 for a sewerage system. The allotment was made, and the sewerage system was completed on August 12, 1937.

(b) The total allotments for all types of projects in Alabama was in excess of $18,400,000, while the total of allotments for power projects in Alabama aggregates approximately $2,300,000—or about one-eighth of the total of Alabama allotments.

(c) The records of the Public Works Administration show that, with two exceptions, each of the applications listed in petitioner's brief were dis-

approved solely because it was determined either (1) that the loan would not be reasonably secure or (2) that the proposed bonds would not be legally valid. Of the two exceptions referred to, one relates to a requested grant of $13,500 by the City of Decatur for a school. That application was pending at the time of the trial herein; the allotment therefor was subsequently made on August 20, 1936 (after the trial was closed), and the school building has actually been completed. The other related to an application by Morgan County, Alabama, for a loan of $112,000 for a county jail. This was rejected on the ground that the loan would not be reasonably secure. The application was withdrawn and there was substituted an application for a grant in the amount of $24,500. This was approved on October 23, 1936, but no allotment was made. The files do not show and we have been unable to ascertain the reason for the failure to make this one small allotment.

(d) In the 25 northern counties of Alabama allotments for non-power projects have been made in a sum in excess of $11,000,000. These projects include waterworks, sewers, schools, jails, highways, alms houses, hospitals, gas plants, and court houses. Accordingly, in the part of Alabama adjacent to the cities involved in the case at bar, allotments have been made aggregating more than $13,000,000, of which only ~~appropriately~~ APPROXIMATELY $2,300,000 has been for power projects.

It thus appears that petitioner, having assigned no error in this Court to the findings of the trial

court, is asking this Court to set aside or ignore those findings, not on the basis of anything in the record, but on the basis of incorrect conjectures made by petitioner as to non-record facts.

The charge that the sole purpose in approving the loans and grants was to aid the Tennessee Valley Authority

One further contention of petitioner requires notice. That contention is that the Administrator, in determining whether or not to make these loans and grants, applied the sole test of whether such action was or was not necessary to provide retail outlets for Tennessee Valley Authority's power under the rate control of the Authority. No such contention was made in either of the courts below. In its assignments of error in the court below (Assignment No. 25 in Case No. 84 and Assignment No. 26 in Case No. 85, R. Vol. I, 487, 496), petitioner contended that the trial court erred in failing to find that in making the loans and grants the defendants are cooperating with the Tennessee Valley Authority to effectuate a plan to promote public ownership of utilities and to control and regulate intrastate electric rates. In summarizing these assignments in its brief in the Court of Appeals, petitioner stated that the Court erred in failing to find that *one* of the purposes in making the loans and grants in the Alabama cases was to provide a market for electricity generated by the Ten-

nessee Valley Authority (Brief in Court of Appeals, p. 26).

That petitioner has not, until the filing of its present brief, asserted that the Administrator's sole purpose was to provide outlets for Tennessee Valley Authority's power, appears most strikingly from the first petition for certiorari it filed herein, on September 5, 1936, prior to the decision in the court below, but based on the record now before this Court. There petitioner stated (p. 8)—

> The purpose of the grants of 30 or 45% of the cost of labor and materials entering into the proposed projects, the loans repayable only out of net earnings of the proposed projects, was to induce the municipalities to undertake the construction of the proposed projects. *The idea was to "prime the pump" of business by bringing about public construction. In addition,* the respondent Ickes, through the making of the loans and grants for public utility electric power projects is effectuating *"the national power policy"* of the incumbent Federal Administration to make electricity more widely available at cheaper rates by subsidizing through these loans and grants, or threatening to subsidize competitively publicly-owned electricity projects. [Italics added.]

The claim that the allotments were made for the *sole* purpose of furnishing an outlet for power of the Authority is made for the first time in petitioner's present brief (Br. p. 57).

It is easy to understand why the argument was not made heretofore. The cases before Chief Justice Wheat involved the validity of allotments to ten cities seven in Alabama and one each in Oklahoma, Texas, and Iowa. The cities of Hominy, Oklahoma, Plainview, Texas, and Iowa City, Iowa, are far removed from the Tennessee Valley Authority area. Since it was contended that the allotments were all equally invalid, it could not well be said that the desire to aid the Authority was the sole motivating factor in making the loans and grants. By the time the litigation reached the Court of Appeals, the Hominy and Plainview cases had become moot, but the Iowa City case remained, and again the argument could not be made. It was only after the Iowa City controversy was disposed of (while the case was pending in this Court) that the ground of attack shifted and what was theretofore advanced as only one of many factors became the sole test of action. We submit that neither the position taken in the court below nor the position now taken here is the correct one.

The evidence amply demonstrated and *the trial court found* that loans and grants for the financing of municipal electric projects were dealt with in the same manner and *judged by the same tests as other projects* (Fdg. 32, R. I, 461). Petitioner again completely ignores this finding and bases its argument on certain selected bits of evidence from the entire record.

It is first claimed that the applications filed by the cities show that they intended to purchase power from the Tennessee Valley Authority and resell it at rates prescribed by the Authority. The applications are neither incorporated nor referred to in the loan and grant agreements and are prepared by the municipalities and contain no guide to the purposes or policies of the Administrator. But if the applications are of significance, it should be noted while the applications do not appear in full in the record, the record does show that Florence furnished detailed statistics on local unemployment and stated the incidence of material orders (R. II, 107); that Hartselle, Sheffield, Tuscumbia, and Russellville stated their relationship to the Tennessee Valley Authority project under the heading "Long Range Development" (R. II, 111, 122, 124, 127); that Decatur furnished estimates of the labor which would be employed (R. II, 93, 94), described the unemployment situation locally (R. II, 94) and the incidence of material orders (R. II, 94), and under the heading "Economic and social value" stated "In the first place, the construction would put many unemployed men to work" (R. II, 92).

It is next contended that the only reason given for the approval of the Decatur allotment is that the project will aid the Tennessee Valley Authority in obtaining a market for its electrical energy.

The resolution of the Special Board for Public Works with respect to the Decatur project recommends that the project be included in the comprehensive program of public works "for the reason, *among others,* that the Tennessee Valley Authority has acquired the necessary transmission lines to serve said distribution system and the financing of said project will aid said Authority in obtaining a market for its electrical energy" (R. Vol. II, 343, 344).[4] This is a far cry from approving it for the sole purpose of providing a market for the Authority's power. This resolution was adopted in 1934 prior to the execution of the first loan and grant agreement with the City of Decatur, dated December 6, 1934, which contained a provision requiring it to purchase power from the Authority. Whatever may be said as to the validity of the reason given in the resolution, it is no longer pertinent in view of the change in the contract and subsequent elimination of all reference to source of electric power.

The first contracts between the cities of Sheffield and Decatur and the Administrator contained provisions conditioning the loans and grants upon an agreement by the cities to purchase power from the Authority. These contracts were terminated in

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[4] The Special Board for Public Works, like the Electric Power Board of Review, had only advisory powers (Fdg. 33, R. I, 462). The President and the Administrator did not act on the basis of written data alone; in some instances they acted on the basis of oral discussions which were not reduced to writing (Fdg. 31, R. I, 461).

December 1935 and new contracts were executed. The new contracts say nothing about the source of the cities' power. The trial court found—and on this point the evidence is undisputed—that the provisions of earlier contracts designating the agency from whom the municipality must purchase its power were eliminated before any action was taken pursuant thereto by any of the municipalities (Fdg. 37, R. I, 463). The loan and grant agreements with the cities of Russellville, Hartselle, and Guntersville *at no time* contained any provision with respect to the purchase of power, a fact which would seem to dispose completely of the contention on page 57 of petitioner's brief that the Russellville allotment was approved to distribute the Authority's electric energy. So far as the respondents are concerned, each of the cities involved in these suits is free to buy power from whom it will, including the petitioner, Alabama Power Company. If any city decides to contract with the Tennessee Valley Authority for power it will do so of its own free will and accord and in the exercise of its own unfettered discretion. At the time of the trial none of them had done so.

Petitioner relies upon a report of the Tennessee Valley Authority published in December 1936 to show that Sheffield had a contract with the Authority dated *March 1936* which contains a provision requiring that city to re-sell its power at specified rates. The trial in the case at bar began on *April*

20th and ended on *May 26, 1936.* At the trial petitioner called Hoyt Greer, President of the City Commission of Sheffield, as its witness, and on direct examination he testified (R. II, 158–159), "We do not have a contract with Tennessee Valley Authority to supply power to the municipal system when it is built. We did have such a contract which was cancelled possibly in the fall, or maybe in July 1934." There is no record evidence to the contrary.

To make its point, petitioner thus relies on non-record evidence, and solely with respect to Sheffield, as to which the case is now moot. With respect to each of the other cities involved in the cases when tried, there is testimony similar to that given with respect to Sheffield; namely, that there were no contracts with the Authority in existence at the time of the trial (R. II, 130, 149, 155, 158–159).

The charge of conspiracy with the Tennessee Valley Authority

Petitioner, in its bills (R. I, 224–225, 343), in its assignment of errors below (R. I, 487), and its briefs in the court below, charged that the Administrator was engaged in a conspiracy with the Tennessee Valley Authority to cause financial loss to petitioner, and in its present brief (pp. 8, 57–58), by use of selected and truncated portions of the evidence, strives to make it appear that the Administrator improperly held up the allotments to

the cities for that purpose. But when the entire evidence on that question is read it shows the exact contrary, namely, that if there was a "conspiracy" between the Authority and the Public Works Administration, it was a "conspiracy" to induce the Alabama cities to purchase the properties of the Alabama Power Company, rather than construct new plants, in order to avoid a loss to that company. This appears from the following facts (R. II, 128–158, 476–482):

The Authority had agreed to purchase a fractional part of the transmission properties of the Alabama Power Company. (See *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288, 316.) In order to avoid loss to Alabama Power Company, the Authority had also procured an option from that company to acquire its distribution systems in a group of Alabama cities, its purpose in procuring that option being to rehabilitate those distribution systems and then sell them to the respective cities. It was unwilling to do so, however, unless it could induce *all* the cities to buy the systems located within their respective limits (R. II, 473). A witness for petitioner, Mayor Glenn, of Florence, Alabama (one of those cities), testified that Director Lilienthal called the representatives of those cities together and said, "*The Administration was opposed to the confiscation of property,*" and, for that reason, wanted to work out the purchase of the properties of the Alabama Power

Company rather than to have municipal competition (R. II, p. 143). Mayor Glenn also testified (R. II, p. 144):

> I don't think that it was the attitude of either TVA or PWA to have me take steps which would destroy these properties or prevent my purchase of them from the company. They never expressed such an attitude to me, nor did their conduct ever indicate that they had that in mind. On the contrary, they wanted to purchase them and not allow them to be destroyed.

Mayor Glenn further testified that his city was unwilling to buy the distribution system in his city at the price offered, believing that the price was $40,000 too high (R. II, 143–144). At the request of Director Lilienthal the Administrator (R. II, 137) notified Mayor Glenn by telegram (partly quoted in petitioner's Brief, p. 58) that the Public Works Administration would not, at that time, make a loan and grant to Florence which would enable it to build its own competitive plant, because it was felt desirable to cooperate with the Authority. *In other words, the so-called conspiracy was a conspiracy on the part of the Public Works Administration and the Tennessee Valley Authority (1) to have the City of Florence buy property of the power company at what the city considered an excessive price so as to avoid loss to the power company, and (2) thereby to work out a plan for selling all such properties to the several Alabama cities,*

in order to avoid the construction of duplicating plants destructive of the company's business there.

The Administrator sent the telegram to Mayor Glenn, above referred to, because the Administrator was endeavoring not to obstruct the Authority in its desire to have the cities buy from the Authority the properties which it would acquire under its option from Alabama Power Company rather than to have the cities build competing plants. And it was with reference to that attitude that the Administrator testified (R. II, p. 526) as follows:

> I think in the case of Florence, Alabama, we took the position that since T. V. A., which was another government agency created under a separate statute, was trying to work out its problem, we ought to cooperate with it, and I did, as a matter of fact do whatever I could to help T. V. A. work out its problem.

It was in considerable part because Mayor Glenn refused to purchase that property that the Authority's plan of buying the company's property and selling it to the cities fell through (R. II, 143). There is also evidence in the record that negotiations, between Alabama Power Company and others of the Alabama cities, failed because those cities felt that the price asked for the properties was too high. Petitioner in the court below asserted that the cities believed the price to be paid was too high merely because those cities could build competing plants aided by Public Works grants.

The evidence on that subject is in conflict. (See, for instance, R. II, 483; 141.)

The following facts also demonstrate the absurdity of the charge of conspiracy between the Public Works Administration and the Tennessee Valley Authority which would cause financial loss to the Alabama Power Company, and shows how lacking in seriousness was the effort of the Alabama Power Company to sell its properties to those cities:

Mayor Glenn was asked by petitioner at the trial to produce certain letters received from Director Lilienthal explaining why the Authority gave up its efforts to exercise the option to buy the distribution systems from Alabama Power Company and sell them to the cities. Having called for the production of these documents, petitioner did not offer them, and they were later offered by defendants and received in evidence. Those letters, and particularly the memorandum enclosed with the letters of the Authority to the Mayors of the Alabama cities (R. II, 477–482), show that, after the Authority had negotiated with the Alabama Power Company for the purchase of the company's facilities in certain communities in northern Alabama, the indefinite delay and possible obstruction of the transaction occasioned by the resort of certain preferred stockholders of the company to litigation first in the state and later in the Federal courts (see *Ashwander* v. *Tennessee Valley Authority, supra*)

and the insistence by the trustee for the bondholders of the Alabama Power Company on an "independent appraisal" of the properties to be conveyed to the Authority, made it unjustifiable for the Authority to urge that the Alabama communities delay their plans for constructing power projects any longer in reliance upon eventual performance of the contract between it and the Alabama Power Company (R. II, 480–482).

There can be no possible doubt that the Alabama cities desired to engage in municipal operation. There was a question of *how* they should do so—whether (1) by purchasing the Alabama Power Company's properties, or (2) by constructing their own competitive plants. *The record shows plainly that the Public Works Administration aided the Tennessee Valley Authority in trying to persuade the cities not to build competing plants, but to buy the petitioner's facilities in order to avoid loss to the company.*

The trial court found that there was no conspiracy (Fdg. 35, R. I, 463) and further found (R. I, p. 453):

> The Tennessee Valley Authority attempted to persuade the city of Florence to enter into a plan whereby the Authority would exercise its option (later abandoned) to purchase distribution systems in Florence, Alabama, and several other communities, from the Alabama Power Company, rehabilitate them, and turn them over to the communities. *This plan was inaugurated in an attempt by the Tennessee Valley Author-*

> *ity to prevent duplication of existing facilities of the power company and for the purposes of protecting the investment of the Alabama Power Company.* The city of Florence rejected this proposal as disadvantageous to itself, and made a counter-proposal that it purchase the existing facilities of the Alabama Power Company at Florence, and use funds to be supplied by the Public Works Administration for rehabilitation and extensions. Later this plan was abandoned by the Tennessee Valley Authority. P. W. A. refused to make a loan or grant to the City of Florence until this plan had been abandoned. [Italics supplied.]

Nor is it possible for petitioner seriously to urge that the Administrator acted improperly when he sought to avoid interfering, through any of his activities, with the plan of the Authority to have the cities purchase petitioner's properties instead of creating duplicating plants. Suppose that the City of Guntersville, which is located on the Tennessee River, instead of requesting a loan and grant for a power plant had applied for an allotment with which to construct a municipal levee. And suppose that the War Department was at the same time contemplating a program of improving the Tennessee River by the construction of levees at various points along the river. Would it have been improper for the Administrator to withhold consideration of the city's application until he had ascertained whether the construction of its project would be consistent with the program of the War

Department? And if the Administrator found that the city's project would interfere with the War Department's program, could he be criticized for disapproving the city's application?

Petitioner has not assigned error in this court to any of the findings of the trial court. (See Specification of Errors, Pet. Brief, p. 14.) Even if it had, the evidence relied on falls far short of overcoming those findings, including that to the effect that these projects were judged by the same tests as any other projects. What petitioners contention really comes to is that the Administrator should not have approved these projects, though otherwise legal, because the cities might of their own free will decide to purchase power lawfully generated at Wilson Dam. This position is a most anomalous one, since this Court upheld, in the *Ashwander* case, a contract of the Authority to purchase transmission lines in order to be in a position to supply power to some of the very cities involved in these suits.[5]

The Employment Created

The appropriateness of the public works program as a means of increasing employment, and the results of the program as vindicating the judgment of Congress, are discussed *infra*, pp. 149 to

[5] The plaintiffs in the *Ashwander* case attempted to assail the activities of the Public Works Administration, but the lower courts and this Court refused to consider those contentions. The attempt is now made to inject into this case the activities of the Tennessee Valley Authority.

155, in connection with the discussion of the spending power of Congress. As has been noted (p. 11, *supra*), there has been administrative determination that the projects here in question satisfy the requirements of the statutes with respect to the application of the funds for work under each project. Every contractor on a Public Works project is required to furnish detailed data on employment and purchases to the Bureau of Labor Statistics (Fgd. 46, R. I, 467). Neither by examining such data nor otherwise did petitioner attempt to overcome the presumption, arising from executive action, that these projects in fact contributed to an increase in employment.

Nevertheless petitioner stresses the fact that the direct labor at the site on a power project is less than the direct labor furnished at the site by the construction of other types of projects, such as buildings, waterworks, sewers, and roads. But power projects themselves differ in this regard; the construction of a hydroelectric project, including a dam and generating and distribution facilities, such as that involved in the *Duke Power Co.* case, doubtless requires a relatively large amount of labor at the site. The construction of a distribution system alone doubtless requires a greater relative expenditure for labor away from the site, in the fabrication and transportation of materials to be used in the project. See R. II, 554. Because the value of a public works program lies largely in the regenerative effect of a stimulation of the construction industry, it is evident that projects whose

construction requires a relatively large amount of labor away from the site, in related industries, have a peculiarly appropriate place in a comprehensive program of public works.

SUMMARY OF ARGUMENT

I

Petitioner has no standing to challenge the constitutional and statutory validity of the proposed loans and grants. That conclusion, reached by the court below, accords with the decisions of every other appellate court which has passed upon the question. *Duke Power Co.* v. *Greenwood County,* 91 F. (2d) 665, pending on certiorari, No. 397; *Arkansas-Missouri Power Company* v. *Kennett,* 78 F. (2d) 911 (C. C. A. 8th); *City of Allegan* v. *Consumers Power Co.,* 71 F. (2d) 477 (C. C. A. 6th), certiorari denied, 293 U. S. 586; *Kansas Utilities Co.* v. *City of Burlington,* 141 Kans. 926, petition for certiorari dismissed on motion of petitioner, 296 U. S. 658. A contrary result would establish either a new doctrine of private law, enlarging the rights of franchise holders against lawful competition, or a new doctrine of public law with respect to the action of Government officers.

The loss with which petitioners are threatened is attributable to the competition of the cities, and that competition is voluntary and is admittedly lawful under the law of Alabama and under the Fourteenth Amendment. The standing of petitioner, as the holder of non-exclusive franchises, is

limited to complaints against unauthorized or illegal competition, as in *Frost* v. *Corporation Commission,* 278 U. S. 515. Cases in which a city is acting in violation of its own charter powers, such as *City of Campbell* v. *Arkansas-Missouri Power Co.,* 55 F. (2d) 560 (C. C. A. 8th), have no application, as was recognized by the same court in the later *Arkansas-Missouri Power Co.* case, *supra.*

The fact that the competition will be made possible by advances of funds alleged to be beyond the lawful authority of the lender cannot serve to confer additional protection upon the petitioner. Cf. *Railroad Company* v. *Ellerman,* 105 U. S. 166; *Sprunt & Son* v. *United States,* 281 U. S. 249; *Chicago Junction Case,* 264 U. S. 258. And the fact that the lender is the United States is likewise not material. Since no legally protected interest of petitioner will be infringed, there is no occasion for the defendant to justify the proposed loans and grants by showing the authority of a valid statute. That the suit is brought against Government officers, so far from enlarging the standing of the petitioner, discloses the deficiency in its claim; for in such suits the officer is required to show valid authority only if his acts, viewed as those of a private individual, would constitute an invasion of an interest which the law would otherwise protect or which has been especially conferred by statute. *In re Ayers,* 123 U. S. 443; *Ex parte Young,* 209 U. S. 123; *Ex parte La Prade,* 289 U. S. 444. Cases holding that a defendant is answerable

where he has induced another, by fraud or intimidation or with a solely malicious motive, to cause damage to a plaintiff, have no application to the cases at bar.

II

The proposed loans and grants are authorized by the statutes. That Congress intended electric power projects, whether competitive or not, to be eligible for loans and grants, is made plain by the terms of the statutes, by their legislative history, and by their administrative construction, which has met with uniform judicial approval and has been confirmed by four congressional enactments. An amendment which would have excluded competitive projects was rejected in connection with the Emergency Relief Appropriation Act of 1935. Congress itself determined that electric projects of the type here in question are an appropriate part of a comprehensive program of public works for the relief of unemployment.

III

The statutes do not unlawfully delegate legislative power to the Administrator. They require a comprehensive program of public works to be undertaken and enumerate various classes of eligible projects. They set a limit on the relative amount of the grant and require loans to be reasonably secured; this in turn requires that the project be sound from a legal and engineering standpoint and, in the case of public borrowers, that the project be

duly authorized by sovereign action. A major element of discretion resides not in the Administrator but in the local applicant. The discretion reserved to the Administrator is essentially that of segregating a lump sum appropriation for various classes of eligible projects. The validity of legislation conferring such authority is attested by historic practice and by the decisions. *Cincinnati Soap Co.* v. *United States,* 301 U. S. 308; *United States* v. *Hunson,* 167 Fed. 881 (C. C. A. 9th). The argument of the petitioner is one of legislative policy, not of constitutional law.

In comparable fields of action similar grants of authority to the executive have repeatedly been sustained; in the administration of public lands (*Butte City Water Co.* v. *Baker,* 196 U. S. 119; *United States* v. *Grimaud,* 220 U. S. 506, 516; *United States* v. *Hanson,* 167 Fed. 881 (C. C. A. 9th)); the establishment of fiscal agencies (*McCulloch* v. *Maryland,* 4 Wheat. 316); the disposal of government property (*United States* v. *Chemical Foundation,* 272 U. S. 1; *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288); and the borrowing of money on the credit of the United States.

IV

The statutory provisions are a legitimate exercise of the power to appropriate money to promote the general welfare. In *Steward Machine Co.* v. *Davis,* 57 S. C. 883, this Court upheld the Federal tax and credit as a means of mitigating the finan-

cial burdens which the Federal Government necessarily assumes in the relief of unemployment, and this Court adverted in particular to the expenditures made in connection with public works. In choosing a public works program as a means of increasing employment, Congress recognized the fact that the construction industry is a key industry in relation to employment and had suffered the most drastic decline. A program of public works as a remedy for unemployment had been widely advocated by business leaders and economists and had been previously adopted both in this country and abroad. The results confirmed the appropriateness of the means chosen. See *Monthly Labor Review,* (U. S. Department of Labor), Oct., 1936, for a summary of the employment created by the public works program. The fact that electric distribution systems require relatively less labor at the site than in the fabrication and transportation of the materials used, does not support an argument that Congress should have excluded such projects from the comprehensive program. On the contrary, this type of project is of particular value in contributing to the regenerative effect of a stimulation of the construction industry.

V

There is no invasion of the reserved powers of the states. There is no coercion of the states and their subdivisions to build public works projects, much less to build power plants in particular.

The inducement is even less strong than that to be found in the provisions of the Federal Social Security Act sustained in *Steward Machine Co.* v. *Davis*, *supra*. Nor is there any regulation of local utilities. The only interest of the United States is that of a holder of the bonds of the cities, possessing only the limited rights of bondholders conferred under the laws of the state.

The system of Federal grants-in-aid is an established form of cooperation between Federal and state governments, each exercising its delegated powers and each seeking to accomplish purposes within its legitimate sphere. Such grants have been made regularly for education, public health, highways, forest fire prevention, and other purposes.

The states and their subdivisions are merely aided, if they so choose, to exercise reserved powers which they have consistently exercised under the Constitution without successful challenge in the past.

VI

The alleged improper purpose, motive or standard of the Administrator is irrelevant. Apart from the fact that the findings of the District Court negative the petitioner's charge in this respect, such an improper purpose would in any event be irrelevant as a matter of fact, since, as petitioner properly acknowledges, the financial loss to it as the result of the proposed loans and grants will be the same whatever the purpose or motive of the

Administrator. In the second place, the alleged improper purpose of the Administrator is legally irrelevant. If, as we have shown, the statutes are valid and the loans and grants are authorized by the statutes and conform therewith, neither the statutes nor the action taken can be rendered invalid by the Administrator's purpose or motives. *Dakota Central Telephone Co.* v. *South Dakota*, 250 U. S. 162; *Isbrandtsen-Moller Co.* v. *United States*, 300 U. S. 139, 145.

ARGUMENT

I

PETITIONERS HAVE NO STANDING TO CHALLENGE THE CONSTITUTIONALITY OF THE FEDERAL STATUTES OR ASSERT A VIOLATION THEREOF

INTRODUCTORY

The Court of Appeals has held that petitioner is without standing to attack the constitutional validity of Title II of the National Industrial Recovery Act or the Emergency Relief Appropriation Act of 1935, or the validity of the acts of the Administrator pursuant thereto. In so holding, the court adopted the view taken by every appellate court which has passed upon the question.* We submit that this view is clearly correct.

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*Duke Power Co. v. Greenwood County, 91 F. (2d) 665, pending on certiorari, No. 397; *Arkansas-Missouri Power Company* v. *Kennett*, 78 F. (2d) 911 (C. C. A. 8th); *City of Allegan* v. *Consumers Power Co.*, 71 F. (2d) 477 (C. C. A.

Petitioner does not rely upon its status as a Federal or local taxpayer to support its right to maintain this suit. It relies solely upon its status as a holder of non-exclusive franchises to operate electric generating and distribution systems, with which the proposed municipal electric projects will compete. It is conceded that the competition of the municipalities is lawful under the law of Alabama. *Oppenheim* v. *City of Florence,* 229 Ala. 50. The attack now made is necessarily confined to the claim that injury will result from the asserted unconstitutional or unauthorized activity of the Administrator in making the loans and grants to the municipalities.

The only financial loss which petitioner will suffer will be the immediate consequence of voluntary and lawful competition by the cities. Such financial loss involves no invasion of any legally protected interests of the petitioner, no invasion of any of its private legal or equitable rights. It is therefore *damnum absque injuria.*

The contention of petitioner that it is entitled to be protected against such competition if it is made possible by invalid acts of a Federal officer, and that, therefore, it may challenge the validity of the action of the Administrator, would, if ac-

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6th), certiorari denied, 293 U. S. 586; *Kansas Utilities Co.* v. *City of Burlington,* 141 Kans. 926, petition for certiorari dismissed on motion of petitioner, 296 U. S. 658. In *Kansas Gas & Elec. Co.* v. *City of Independence,* 79 F. (2d) 32 (C. C. A. 10th) the question was expressly passed by.

cepted, establish a new doctrine of public or of private law.

(a) The principle for which petitioner specifically contends would establish a new doctrine of public law; namely, that when a Government officer is sued it is necessary merely to show that the officer was acting in excess of lawful authority and his acts made possible substantial financial loss to the plaintiff; and that it is not necessary to show that the officer's action has invaded any interest of the plaintiff which the law would otherwise protect or has violated any right of the plaintiff which the law has specially conferred. Acceptance of such a doctrine would mark a departure from principles to which this Court has long adhered. See pp. 89–98, *infra*.

(b) If no such new doctrine of public law is to be established, the petitioner's contention would require the establishment of a new doctrine of private law, namely, that a suit may be maintained against a private person who by financial aid has made possible lawful and voluntary competition between a third party and the plaintiff, on the ground that in extending such aid the defendant acted in violation of law, i. e., was using funds of some other person (not the plaintiff) which he had no lawful right thus to employ. Such a doctrine of private law would open the courts to a new class of complaints in the field of business competition, and would impose hitherto unrecognized restraints on competition which is lawful and voluntary.

The fallacy in this second contention was succinctly exposed in the opinion by Judge Parker in *Duke Power Co.* v. *Greenwood County,* 91 F. (2d) 665, 676, now before this Court (No. 397, present Term):

> It is true that grounds for relief may exist against action innocent in itself if taken to enable another to violate rights of complainant; but we know of no principle upon which action which violates no right may be enjoined because in aid of another action which violates no right. * * * and we cannot see that the source of the funds can affect the question of invasion of rights, where plaintiff has no such interest in the funds as it could protect by injunction.

A complete answer to petitioner's contention should, however, be made, in view of the importance of the question, by showing the following: (1) the competition of the cities is voluntary and lawful, and the threatened damage to petitioners is attributable to that competition; (2) there is no standing to challenge the validity of a loan and grant which will make possible such competition; (3) the fact that the suit is against a Government officer does not enlarge the standing to complain; on the contrary, the nature of such a suit discloses the deficiency of the claim; and (4) the authorities cited by petitioner, not involving intervening lawful competition but dealing with coercion or fraud or malice, have no application here.

It will be seen that in the view we take of the question it is not of controlling importance that the suits are against the Administrator rather than against the United States. It is not and has not been our position that the suits must fail because they are, in essence, suits against the United States. Our position is that the petitioner has no cause of action against either the United States or the Administrator, because no legal interest of petitioner is threatened, and it therefore cannot require the United States or the Administrator to justify the proposed action by showing that it will be taken under the authority of a valid statute.

1. *The municipal competition is lawful and the threatened damage is attributable to that competition*

Under the statutes and decisions of Alabama, the proposed municipal undertaking is concededly lawful. And as it is not forbidden by the terms of petitioner's franchises it is likewise lawful under the Fourteenth Amendment.

The rights of a franchise holder are strictly construed, and the courts have been careful to avoid an extension of those rights into an unintended monopoly. When holders of non-exclusive franchises have endeavored to prevent competition by a state or municipality, this Court has held again and again that such franchises "are confined to the letter of their expressed grant" (*Madera Water Works* v. *Madera*, 228 U. S. 454,

456), and that the possibility of such competition is a risk "which the [plaintiff] took when it entered the field" (*Puget Sound Power & Light Co.* v. *Seattle,* 291 U. S. 619, 626.)[7]

A city may build its own system without the necessity of purchasing existing systems owned by a private company, *Helena Waterworks Co.* v. *Helena,* 195 U. S. 383. A city may build a competing system even though it has granted to a utility company an exclusive franchise as against "any other person or corporation," *Knoxville*

[7] In *Hamilton Gas Light Co.* v. *Hamilton City,* 146 U. S. 258, this Court said (p. 268, 269): "It may be that the stockholders of the plaintiff supposed, at the time it became incorporated, and when they made their original investment, that the city would never do what evidently is contemplated by the ordinance of 1889. And it may be that the erection and maintenance of gas-works by the city at the public expense, and in competition with the plaintiff, will ultimately impair, if not destroy, the value of the plaintiff's works for the purposes for which they were established. But such considerations cannot control the determination of the legal rights of the parties. * * * What was said in *Turnpike Company* v. *The State,* 3 Wall. 210, 213, is quite applicable to the present case: * * *. This court said: 'The difficulty of the argument in behalf of the turnpike company, and which lies at the foundation of the defence, is, that there is no contract in the charter of the turnpike company that prohibited the legislature from authorizing the construction of the rival railroad. No exclusive privileges had been conferred upon it, either in express terms, or by necessary implication; and hence whatever may have been the general injurious effects and consequences to the company, from the construction and operation of the rival road, they are simply misfortunes which may excite our sympathies, but are not the subject of legal redress.'"

Water Co. v. *Knoxville,* 200 U. S. 22. A city may operate its own system without becoming subject to regulation imposed on a competing private system, *Springfield Gas Co.* v. *Springfield,* 257 U. S. 66. A city may exempt its own system from a tax which it levies on a competing system, *Puget Sound Power & Light Co.* v. *City of Seattle, supra.*

The interest which petitioner may assert as a holder of non-exclusive franchises, is a right to be free of competition by one not having a valid franchise to compete. This was the principle applied in *Frost* v. *Corporation Commission,* 278 U. S. 515, relied on by petitioner (Brief, p. 27). In the *Frost* case the plaintiff had secured a license to operate a cotton gin, pursuant to a statute which, this Court held, made the permit the equivalent of a non-exclusive franchise. That franchise, it was held, entitled the holder to challenge the threatened competition of the defendant cooperative corporation on the ground that its purported franchise was void because it could be issued only under a statutory provision which was itself void as in violation of the equal protection clause of the Fourteenth Amendment. This Court thus defined the plaintiff's interest (278 U. S. at 521):

> While the right thus acquired does not preclude the state from making similar valid grants to others, it is, nevertheless, exclusive against any person attempting to operate a gin without obtaining a permit or, what amounts to the same thing, against one who

> attempts to do so under a void permit; in either of which events the owner may resort to a court of equity to restrain the illegal operation upon the ground that such operation is an injurious invasion of his property rights.

That the *Frost* decision was based upon the right to complain of competition threatened by one not having a valid franchise is made clear by the subsequent decisions of this Court. In *Corporation Commission* v. *Lowe,* 281 U. S. 431, 435, it was said:

> In *Frost* v. *Corporation Commission of Oklahoma,* 278 U. S. 515, the Court concluded that one who had complied with the statutes of Oklahoma and had obtained a permit to operate a cotton gin, held a franchise which constituted a property right, and that while this right did not preclude the State from making similar valid grants to others, it was an exclusive right as against *attempts to operate a competing gin without a permit or under a void permit.* [Italics supplied.]

And in *New State Ice Company* v. *Liebmann,* 285 U. S. 262, 273, a similar statement of the *Frost* case is found.

Gallardo v. *Porto Rico Ry. L. & P. Co.,* 18 Fed. (2d) 918 (C. C. A. 1st), was like the *Frost* case, for there the defendant, the Government of Puerto Rico, was itself proposing to engage in direct competition with plaintiff utility company, and the court held that the defendant, in doing so, was pro-

posing to act in violation of the Organic Act of Puerto Rico.* *Walla Walla City* v. *Walla Walla Water Co.*, 172 U. S. 1, is also inapposite, for there the City had granted the plaintiff water company an *exclusive franchise* and the proposed competition was therefore unlawful. Of course, the loss of customers in such circumstances is actionable, even if plaintiff had no binding contracts with them.

The *Frost* case would be applicable to the cases at bar only if the proposed undertaking by the cities were beyond *their* lawful authority. The contrary, as we have shown, is clearly established.

The other cases cited by petitioner in this connection (Brief, pp. 27–28) are inapposite for the same reason. The courts have not failed to perceive the controlling distinction. In *Campbell* v. *Arkansas-Missouri Power Co.*, 55 F. (2d) 560 (C. C. A. 8th), it was held, on the authority of the *Frost* case, that a utility company was entitled to an injunction against a city to prevent the construction of the city's competing plant, because the issuance of bonds by the city to finance such construction was in excess of *its* charter powers. The court held that in those circumstances the city was in the same position as a rival company threatening to compete without having obtained a valid franchise. That ruling was reaffirmed in two de-

* Moreover, the plaintiff alleged that it was a taxpayer and would be injured as such by the increase in local taxes levied upon it for the operation of the competing plant.

cisions of the same court, *Iowa Southern Utilities Company* v. *Cassill,* 69 F. (2d) 703 (C. C. A. 8th); *Arkansas-Missouri Power Co.* v. *City of Kennett,* 78 F. (2d) 911 (C. C. A. 8th). When, however, the very utility company which had been successful in the *Campbell* case sought to extend the doctrine of that case in the precise way in which petitioner here is seeking to extend it—i. e., to justify an injunction against the Administrator—the Court of Appeals for the Eighth Circuit rejected that contention, pointed out that its decision in the *Campbell* case was inapplicable, and held that the plaintiff had no standing to attack the validity of the Administrator's act in making proposed loan and grant. *Arkansas-Missouri Power Co.* v. *City of Kennett,* 78 F. (2d) 911. The other cases cited are like the *Campbell* case, in that they involved attacks upon the validity of the action of the city itself under state law.[9] Petitioner (like Judge Soper in his dissenting opinion in *Duke Power Co.* v. *Greenwood County,* 91 Fed. (2d) 665, 680) cites the *Campbell* case and ignores the *City of Kennett* case, *supra.*

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[9] *Colorado Central Power Co.* v. *Municipal Power Development Co.*, 1 F. Supp. 960 (D. Col.); *Oklahoma Utilities Co.* v. *City of Hominy*, 2 F. Supp. 849 (D. Okla.); and *Kansas G. & E. Co.* v. *City of Independence*, 79 F. (2d) 32 (C. C. A. 10th); *Mississippi Power Co.* v. *City of Starkville*, 4 Fed. Supp. 833 (D. N. D.), involved what the court held to be a breach by the defendant city of a covenant of quiet enjoyment made by the city in connection with the sale of property to the plaintiff utility company.

It is unnecessary to consider whether the above applications of the rule in the *Frost* case are sound. For in the cases at bar, the validity of the action of the cities under the law of Alabama is conceded, and it is the cities which will compete. The courts have taken proper care to avoid confusing this situation with that presented in petitioner's authorities.

The case of *Citizens Electric Illuminating Co.* v. *Lackawanna & Wyoming Valley Power Co.*, 255 Pa. 145, specially relied upon by petitioner (Brief, p. 28) is similarly beside the point. There the defendant, a utility company, with a franchise limited to a particular area, proposed to sell power, at wholesale, in a township in which it had no franchise to operate, and in direct unlawful competition therein with the plaintiff utility company which had a valid franchise covering that township. Plaintiff was granted an injunction. It happened that the proposed purchaser of the power from defendant was a third utility company which had a valid franchise to sell, at retail, in competition in that township with plaintiff. But the wrong complained of was the illegality of the *direct competition,* at wholesale, between plaintiff, having a valid franchise covering that territory and defendant, which had no such franchise.[10]

[10] The court also relied upon a Pennsylvania statute expressly giving a cause of action for damages resulting from an *ultra vires* act.

Here neither the United States nor the Administrator is proposing to compete with petitioner. As was said in *Arkansas-Missouri Power Company* v. *City of Kennett,* 78 Fed. (2d) 911 (C. C. A. 8), "The United States is not proposing to become a competitor of the power company. It will have no right, title, or interest in the plant when completed and nothing to do with operating it. The destruction of the power company's property will come about by reason of the city's operation of the plant when erected. The position of the United States is that of a lender of money, a buyer of bonds, and a giver of gifts. True, the money procured from the government will enable the city to build the plant, and, if the city builds the plant, it will no doubt operate it, and when it does operate the plant the city will take the customers of the power company, and the company's property in Kennett will become worthless or greatly impaired in value. We know of no rule of law, however, which permits one indirectly hurt, no matter how seriously, by a government expenditure, to question the power of the government to make it." See also *Kansas Gas & Electric Co.* v. *City of Independence,* 79 Fed. (2d) 638 (C. C. A. 10); *Missouri Utilities Co.* v. *City of California,* 8 Fed. Supp. 434.

It must be concluded, we submit, that the court below was right in stating (R. I, 515), "The thing which affects the plaintiffs is the competition, and that is lawful."

2. *Petitioner is not entitled to challenge the validity of loans and grants which will make possible the competition of the cities*

It is settled that where a defendant renders financial aid which makes the lawful competition of a third person possible, a competitor has no standing to complain that the action of the defendant is unlawful. No case has been cited, and we know of none, holding that the validity of advances or gifts by others may be drawn in question by a competitor of the borrower or grantee. A decision to the contrary would be novel and far-reaching. Its result would be that the validity of bank loans could be attacked by competitors of a borrower, and that the validity of bond purchases could be challenged by competitors of the issuer. If petitioner's contention were correct, a utility company could inquire into the validity of a bank loan made to a competing utility company which had a valid franchise, and a shoe company could challenge in court the validity of a bank loan made to a rival shoe company engaged in fair and lawful competition. The decisions of this Court, of the lower Federal Courts, and of the state courts show that no such restraints on competition will be imposed.

In *Railroad Company* v. *Ellerman*, 105 U. S. 166, the City of New Orleans, which owned certain public wharves from which it received dues, made a contract with Ellerman granting to him the right to collect the revenues derived therefrom. The

defendant railroad company had been authorized by the legislature to maintain a wharf solely for railroad purposes. Nevertheless the railroad company proposed unlawfully to lease its wharf to third persons, who planned to make it available to the public, thus competing with Ellerman and threatening loss of patronage and financial damage. Ellerman brought suit to enjoin the execution of the lease. He contended that he was entitled to prevent such competition on the ground that the railroad could neither lawfully operate a public wharf nor enable others to do so. This Court held that the unlawfulness of the railroad company's lease gave Ellerman no standing to complain of the resulting competition and that therefore he was not entitled to an injunction. Mr. Justice Matthews said (pp. 173–174):

> The sole remaining question, then, is whether Ellerman, as assignee of the city, has any legal interest which entitles him to enjoin the company from using its wharf as a public wharf beyond the limits of such use, as defined by that construction of the joint resolution. If he has such interest, it can only consist in preventing competition with himself as a wharfinger, which such more extensive use of the railroad property would create. And if the right to assert it exists, it must rest, not upon the claim that the premises are thus used for purposes to which they might not be lawfully devoted if owned and used by a natural person, but on the allegation merely

that such use is beyond the corporate powers of the company. But if the competition in itself, however injurious, is not a wrong of which he could complain against a natural person, being the riparian proprietor, how does it become so merely because the author of it is a corporation acting ultra vires? The damage is attributable to the competition, and to that alone. But the competition is not illegal. It is not unlawful for any one to compete with the company, although the latter may not be authorized to engage in the same business. The legal interest which qualifies a complainant other than the State itself to sue in such a case is a pecuniary interest in preventing the defendant from doing an act where the injury alleged flows from its quality and character as a breach of some legal or equitable duty. * * * In these questions the appellee has no interest, and he cannot raise them in order, under that cover, to create and protect a monopoly which the law does not give him. The only injury of which he can be heard in a judicial tribunal to complain is the invasion of some legal or equitable right. If he asserts that the competition of the railroad company damages him, the answer is, that it does not abridge or impair any such right. If he alleges that the railroad company is acting beyond the warrant of the law, the answer is, that a violation of its charter does not of itself injuriously affect any of his rights.

National Banks are prohibited by Federal statutes from making certain kinds of loans. This Court has repeatedly held that no one but the United States can object to the making of such loans. *National Bank* v. *Matthews*, 98 U. S. 621; *National Bank* v. *Whitney*, 103 U. S. 99; *Fortier* v. *Bank*, 112 U. S. 439–451; *Reynolds* v. *Bank*, 112 U. S. 405, 413; *Thompson* v. *Bank*, 146 U. S. 240, 251; *Schuyler Natl. Bank* v. *Gadsden*, 191 U. S. 451. National banks have often been held to be agencies of the United States. *McCulloch* v. *Maryland*, 4 Wheat. 316; *Farmers' & M. National Bank* v. *Dearing*, 91 U. S. 29, 33. But no one would suppose that a business man could enjoin an invalid loan by a national bank enabling a new rival to compete.

Petitioner contends, however, that the principle of the *Ellerman* case has no application to acts of a government officer challenged as invalid.[11] But the principle has been given striking application in precisely that class of cases, by this and other courts, Federal and state.

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[11] That an officer acting outside of the authority conferred upon him by a statute is acting "ultra vires," see *Garfield* v. *Goldsby*, 211 U. S. 249, 261; *Noble* v. *Union River Logging Railroad Co.*, 147 U. S. 165, 174.

There is, of course, no distinction between a suit based upon an alleged violation of a valid statute and one based upon action pursuant to an alleged unconstitutional statute. *Goltra* v. *Weeks*, 271 U. S. 536, 543. If petitioner were to assert that the rule for which it contends applies only to the latter kind of case, it would be obliged to abandon its contentions based upon the alleged violation of the statute.

Specifically it has been held that acts of Government officers which are in excess of their powers give no cause of action to a plaintiff where those acts threaten to cause financial loss by bringing about more effective competition. Thus in *Edward Hines Trustees* v. *United States,* 263 U. S. 143, the plaintiffs, manufacturers and shippers of lumber, brought suit to annul an order of the Interstate Commerce Commission which abolished a penalty charge on lumber held by carriers at reconsignment points. The penalty charge had been of substantial benefit to the plaintiffs because of the burden which it placed upon their competitors, and its removal threatened loss of business. The order was attacked on the ground that it exceeded the power of the Commission. This Court held that the plaintiffs were without standing to raise the issue of the validity of the order notwithstanding the fact that, as they alleged, it would result in increased competition, causing damage to them. The order, this Court said, would merely subject the plaintiffs "to such losses as are incident to more effective competition." (263 U. S. at 148.)

The *Chicago Junction Case,* 264 U. S. 258, because its rationale is most significant, deserves particular attention. There a railroad company brought suit to set aside an order of the Interstate Commerce Commission which authorized a competing railroad to acquire important terminal properties. The acquisition of those terminal properties by the competing railroad would have

resulted directly in damage to the extent of millions of dollars to the complaining railroads. The majority of the Court stated that the *Ellerman* case would have been applicable, and that the plaintiffs would have had no cause of action, despite the invalidity of the Commission's order, except for the fact that the Transportation Act, 1920, contained a special provision giving railroads the right to equality of treatment (264 U. S. at 269, note 12). On that statutory basis solely, the majority of the court held that the plaintiffs had a cause of action.

Mr. Justice Sutherland, speaking for the minority, construed the Transportation Act differently, as giving no such special statutory right to the plaintiffs, and, therefore, stated that the *Ellerman* case was applicable and that the plaintiffs had no cause of action. Since the majority and minority were agreed except as to the effect of the special provision of the Transportation Act, the minority opinion by Mr. Justice Sutherland may be taken as expressing the view of the entire Court in the absence of such a special statutory provision.

Mr. Justice Sutherland said (pp. 271, 272, 273):

> The complainants have no standing to vindicate the rights of the public, but only to protect and enforce their own rights. Redress for public grievances must be sought by public agents, not by private intervention. *Home Telephone Co.* v. *Railroad Commission,* 174 Mich. 219. The right of the complainants to sue, therefore, cannot rest upon the alleged violation of a pub-

> lic interest, but must rest upon some distinct grievance of their own. Loss of business, or of opportunities to get business, attributable to the activity or increase of facilities on the part of a competitor is not enough [citing and quoting from the *Ellerman* case]. * * * Their complaint must stand or fall upon the nature of their own grievance. A private injury for which the law affords no remedy, cannot be converted into a remediable injury merely because it results from an act of which the public might complain. In other words, the law will afford redress to a litigant only for injuries which invade his own legal rights; and since the injuries here complained of are not of that character and do not res[illegible] from the violation of any obligation owing to the complainants, it follows that they are without legal standing to sue.

In the case at bar, as in the *Chicago Junction Case*, the rights of the petitioner cannot rest upon the alleged violation of a public interest, but must rest upon some "distinct grievance of their own." The public grievance, consisting of the expenditure of federal funds pursuant to an invalid statute or in violation of a valid statute, cannot be vindicated in court by a citizen, *Frothingham* v. *Mellon*, 262 U. S. 447. And the loss resulting from the lawful competition, made possible by the Administrator's expenditures, does not constitute a distinct private grievance of the petitioner, even if

those expenditures were not authorized by a valid statute.[12]

In *Sprunt & Son* v. *United States,* 281 U. S. 249, shippers brought suit to set aside as void an order of the Commission establishing a new rate structure which deprived the plaintiffs of a special business advantage which they had previously enjoyed over their competitors, with resulting serious financial loss to the plaintiffs. The Court pointed out that "the plaintiffs were deprived by the order of the Commission of a competitive advantage. But the plaintiffs * * * were not subjected to or threatened with any legal wrong." (281 U. S. at 256–257, citing *Edward Lines Trustees* v. *United States,* 263 U. S. 143.)

In the *Sprunt* case the *Chicago Junction Case* was expressly distinguished on the ground that there "an independent legal right of the plaintiff was affected by the order which it was sought to set aside," because "the order violated the plain-

[12] Petitioner (pages 32–33) asserts that it, like the plaintiffs in the *Chicago Junction Case*, has "a special interest," but fails to note that the special interest of plaintiffs in the *Chicago Junction Case* was expressly ascribed in the majority opinion to the statutory rights under the Transportation Act.

Petitioner strives to make it appear that, in the cases cited in the text relating to the Interstate Commerce Commission, there was a lack of casual relation between the Commission's order and the injury to the plaintiffs. By no possibility can that be said to be true in the *Chicago Junction Case.*

tiff's right under paragraph 2 of Section 5 to equal treatment." (281 U. S. at 257, and 257 note.)

Even more recently the same principles have been announced. In *Claiborne-Annapolis Ferry Co.* v. *United States,* 285 U. S. 382, a ferry company was held entitled to maintain suit to annul an order of the Interstate Commerce Commission granting permission to a competing railway company to extend its line by operation of a ferry service. Concerning the right to maintain the suit, the Court said, "The right of appellant Ferry Company to institute and maintain this proceeding *rests wholly upon the permission granted by paragraph 20, Sec. 1.* 'Any party in interest' may institute a suit to enjoin proposed construction, operation, or abandonment of a carrier's line unless it has obtained a certificate of public convenience and necessity from the Interstate Commerce Commisison" (page 391). [Italics supplied.]

In *Mississippi Valley Barge Line Co.* v. *United States,* 292 U. S. 282, a barge line sued to enjoin as invalid an order of the Interstate Commerce Commission permitting lower rates by rail on sugar, which it was alleged would result in destructive competition against the plaintiff. Section 500 of Transportation Act, 1920, provided:

> * * * it is declared to be the policy of Congress to promote, encourage, and develop water transportation, service, and facilities in connection with the commerce of the United States, and to foster and pre-

> serve in full vigor both rail and water transportation.

This Court, after holding that the order of the Commission was not in violation of that provision of the statute, added, with a significant citation of the *Sprunt* case (pages 289–290):

> For the purposes of this appeal we have assumed, as it was assumed in the court below, that the appellant has a standing sufficient to maintain the suit. See, however, *Sprunt & Son, Inc.* v. *United States*, 281 U. S. 249. * * * These objections to the suit coalesce to such an extent with the merits of the appellant's grievance under Sec. 500 of the statute (Transportation Act, 1920) as to make it unnecessary to separate them.

This statement in the opinion serves to reaffirm the principle, discussed above, that the right to maintain such a suit must depend upon the conferring of a specially protected interest.

The lower Federal courts and the State courts have likewise recognized that there is no general right to complain of lawful, fair, and voluntary competition on the ground that it is made possible by an allegedly invalid act of a Government officer. In *United States ex rel. New York Warehouse Assn.* v. *Dern*, 68 F. (2d) 773 (App. D. C.), certiorari denied, 292 U. S. 642, several warehouse companies brought an action against the Secretary of War asking that a lease, for private use of more than 2,000,000 square feet of government warehouse

space, entered into between that official and a corporation, known as the Mercur Company, be cancelled. It was alleged that the plaintiffs were terminal warehouse companies owning millions of square feet of storage space; that the purported lease was in violation of the statutory authority of the Secretary of War, and that the Comptroller General had so ruled; that the lessee (a corporation, with a nominal capital, leasing two millions of dollars of Government property at a fixed rental of but $1.00 a year plus a percentage of the income from the operation of the warehouse) was "in open and direct competition" with plaintiffs, with a marked competitive advantage, and had obtained some of their business and would obtain more "to the substantial detriment of plaintiffs."[12] The court held that the prospective loss to the plaintiffs as a result of the lease gave them no standing to question the legality of the action of the Secretary of War.

Petitioner (Br. p. 33) surprisingly asserts that the interest of the plaintiffs in the *Dern* case "was

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[12] The plaintiffs alleged that:

"*Ships, freights, cargoes, storage business of all kinds, and industrial tenants, are solicited by both your petitioners and by Mercur Corporation*, and especially in the storage of commodities, raw Cuban sugar, for instance, the same consignments are solicited by your petitioners and by the Mercur Corporation. Mercur Corporation in competition and in the *exercise of competitive practices has obtained business, and particularly goods for storage, away from and to the substantial detriment of your petitioners.*" [Italics added.]

negligible," and that the case is distinguishable because "the plaintiffs did not contend * * * that the lease contemplated or required any interference with their business." But the facts alleged in plaintiffs' pleadings (as shown in the Record in this Court on petition for certiorari), and admitted on demurrer, demonstrate the contrary. There was nothing "negligible" about the effects of the competition. And the plaintiffs in that case were no more and no less entitled to be free of interference with their business through the lawful competition of the Mercur Company than is petitioner entitled to be free of loss occasioned by lawful competition from the cities.[14]

In *Milwaukee Horse & Cow Commission Co.* v. *Hill,* 207 Wis. 420, state officers constituting a State Fair Commission were about to lease a portion of the State Fair grounds to plaintiff's direct competitor. Plaintiff was refused a lease of a portion of the Fair Grounds and would thus be at a serious competitive disadvantage, with resulting substan-

[14] Petitioner also refers to the fact that the Court of Appeals for the District of Columbia in that case stated that the interest of the plaintiffs was not "direct, but indirect and remote." But that is the locution employed (to describe the fact that the plaintiff's loss was *damnum absque injuria*) by the Court of Appeals for the Eighth Circuit in *Arkansas-Missouri Power Co.* v. *Kennett*, *supra*, which is quoted with approval by the Court of Appeals for the District of Columbia in the case at bar. And the concurring opinion of Judge Groner in the case at bar concludes with the statement "that in the circumstances the threatened damage to the plaintiff's property is consequential and indirect."

tial direct damage. Plaintiff sued to enjoin the Commission from making the lease on the ground that it was in violation of statute. The court denied the injunction, citing and quoting from the *Ellerman* case, and saying (p. 432):

> The only right of the Commission Company which it is alleged has been infringed is the right to be immune from competition. It has no such right in the law. The law does not recognize any injury resulting from competition to any one engaged in trade or commerce. True, there are such things recognized in the law as unfair competition, which the law will suppress, but it goes without saying that this is not within any of the classes of competition recognized as unjust.

A similar conclusion was reached in *Keen* v. *Mayor and Council of Waycross,* 101 Ga. 588, 29 S. E. 42, opinion by Lumpkin, J., where the threatened competition was by the city.

Reference has already been made to the uniform decisions which have applied these principles in the cases involving loans and grants like those in issue in the cases at bar. See page 62, note 5, *supra.*

The cases above cited make it plain that a utility company, with a non-exclusive franchise, has no greater right to be free from the competition of another utility company, holding a valid franchise, or of a municipality, which is not violating its charter or any contract, than has the owner of a drug store

or warehouse to be free from the lawful competition of a rival drug store or a rival warehouse. As petitioner's right to be immune from the competition of the cities will not be infringed, since that competition is in no respect unlawful, the right of the cities to compete with petitioner is precisely the same as that of a competitor in any ordinary business with a person or company having no franchise. If, therefore, petitioner's contention were sound, a shoe company (or a school or warehouse company) could assert the invalidity of a bank loan made to another shoe company (or school or warehouse company) engaged in fair and lawful competition.

It is because the common law cherishes competition that it will not take the risk of impeding lawful competition by allowing an inquiry into the lawfulness of the conduct of third persons (lenders or donors) but for whose acts such competition would not occur.

The basis in policy for the principles discussed above was thus stated by Mr. Justice Holmes (Privilege, Malice, and Intent, 8 Harvard Law Review 1, 3, cited by petitioner, Brief, p. 26):

> For instance, a man has a right to set up a shop in a small village which can support but one of the kind, although he expects and intends to ruin a deserving widow who is established there already.

The privilege, Mr. Justice Holmes explained, "rests on the economic postulate that free com-

petition is worth more to society than it costs."

In sum, a plaintiff's loss directly resulting from voluntary and lawful competition of a third person constitutes no invasion of his legally protected interests, even though that competition is caused or made possible by the unlawful conduct of the defendant. Such lawful competition acts as a non-conductor or insulator against alleged liability in such cases. As the Court of Appeals for the Fourth Circuit said in its recent opinion in the *Duke* case, 91 F. (2d) 665, 677, "it is well settled that an act which is unauthorized, but which infringes no right of another, may not be enjoined merely because it will enable a third person to enter into competition with that other."

The courts have been careful to avoid, in the form of an extension of procedural rights, the enlargement of rights of property. "Beyond the traditional boundaries of the common law only some imperative justification in policy will lead the courts to recognize in old values new property rights." *Reichelderfer* v. *Quinn*, 287 U. S. 315, 319. This has been notably true in respect of attacks upon voluntary, fair, and lawful competition. Holders of franchises like petitioner's have for decades unsuccessfully endeavored to have this Court widen by implication the limited freedom from competition conferred by their franchises. This suit is one more effort to extend such limited rights; to prevent the sovereign States, acting through their municipalities, from exercising the

powers reserved to them by the Constitution; and, by indirection, to convert a temporary and fortuitous *de facto* monopoly into a legal monopoly, "to create and protect a monopoly which the law does not give." *Railroad Co.* v. *Ellerman, supra,* at p. 174.

3. *The nature of suits against Government officers discloses the deficiency in petitioner's claim*

The petitioners insist that because they will suffer loss as a consequence of the acts of public officers they have an interest which they may vindicate in court by challenging the authority under which those acts are taken. We have discussed above the decisions dealing with acts of public officers, challenged as illegal, which made possible lawful competition causing damage to the complainant (pages 77–86, *supra*). Those decisions make it clear that, unless, by statute or contract, a special right has been conferred on the complainant to be protected from such competition, the courts will not require the defendant to justify his action by showing valid statutory authority and that the validity of the statute is not a relevant or material part of a case or controversy. Those decisions thus furnish a complete refutation of the argument of petitioner.

As the cases at bar would fail, for want of a cause of action, if brought against the United States, petitioner can surely have no greater rights because they are in form suits against officers of

the United States. Since, however, the argument of petitioner appears to rest upon a fundamentally erroneous view of the nature of such suits, and because a consideration of the basis upon which such suits are entertained serves to confirm the answer to petitioner's argument, it may be appropriate to review briefly the basis upon which such suits must rest:

A Government officer may be sued, despite the immunity of the sovereign, where his acts are asserted to be without authority of law. In such a case he is regarded as stripped of his official capacity and, like a private individual, must defend. *Poindexter* v. *Greenhow,* 114 U. S. 270;[15] *In re Ayers,* 123 U. S. 443; *Goltra* v. *Weeks,* 271 U. S. 536; *Ex parte La Prade,* 289 U. S. 444. The officer may defend, like a private individual, on the ground that his acts are in fact justified by authority of a valid statute. In that event, the Court is

[15] "In these cases he is not sued as, or because he is, the officer of the government, but as an individual, and the court is not ousted of jurisdiction because he *asserts* authority as such officer. To make out his defence he must show that his authority was sufficient in law to protect him." *Poindexter* v. *Greenhow*, 114 U. S. at 287, quoting from *Cunningham* v. *Macon & Brunswick R. Co.*, 109 U. S. 446. The Court added, "He stands, then, stripped of his official character, and, confessing a personal violation of the plaintiff's rights, for which he must personally answer, he is without defence. * * * That which, therefore, is unlawful because made so by the Supreme law, the Constitution of the United States, is not the word or deed of the State, but is the mere wrong and trespass of those individual persons who falsely speak and act in its name." (114 U. S. at 288, 290.)

called upon to determine the constitutional validity of the statute. If the statute is invalid, the justification fails and the officer may be held liable. In that event, the Court will exercise "the negative power to disregard an unconstitutional enactment, which otherwise would stand in the way of the enforcement of a legal right." *Frothingham* v. *Mellon,* 262 U. S. 447, 488.

The defense of the officer may, however, like that of a private individual, be properly of a different sort. He may show that the damage to the plaintiff is too conjectural to require justification for the threatened acts. In that event it is unnecessary for the Court to consider the validity of the statute. *Frothingham* v. *Mellon, supra.*

Or the officer may show that if there has been any violation of a legal duty owed to the plaintiff, the duty is not that of the officer but of the sovereign, as, for example, the duty of a trustee imposed by statute. In that event it is likewise unnecessary to consider the validity of the defendant's acts, for the suit will be dismissed as one in essence against the United States. *Morrison* v. *Work,* 266 U. S. 481.

Or the officer may show, as in the cases at bar, that neither he nor the sovereign has invaded any legal interest of the plaintiff; that is, any right which the courts would otherwise protect or which has been specially conferred by statute or contract. And in that event also it is unnecessary to consider the validity of the statute under which the officer

proposes to act or whether the statute has been violated.

The cases in which suits against Government officers have been maintained fall into well recognized categories of legal injury. Thus such suits have been maintained to restrain acts of the following kinds:

(1) A trespass or similar tort against the property of the plaintiff, as by the seizure or distraint or stoppage of goods.[16]

(2) Acts defaming plaintiff's products or constituting a cloud on the title of plaintiff.[17]

(3) Threatened coercion, as by threats of unlawful prosecution of plaintiff's customers or employer, which, if not restrained, will inflict a legal injury upon the plaintiff.[18]

(4) Vexatious and oppressive litigation.[19]

(5) Violation of a right conferred specially by statute, as a right to use of the mails.[20]

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[16] E. g., *In re Ayers*, 123 U. S. 443; *Pondexter* v. *Greenhow*, 114 U. S. 270; *Lipke* v. *Lederer*, 259 U. S. 557; *Hamilton* v. *Kentucky Distilleries Co.*, 251 U. S. 146; *Regal Drug Co.* v. *Wardell*, 260 U. S. 386; *Greenleaf Lumber Co.* v. *Garrison*, 237 U. S. 251.

[17] E. g., *Scully* v. *Bird*, 209 U. S. 481, 488–490; *Lane* v. *Watts*, 234 U. S. 525; *Noble* v. *Union River Logging R. R. Co.*, 147 U. S. 165.

[18] E. g., *Pierce* v. *Society of Sisters*, 268 U. S. 510; *Truax* v. *Raich*, 239 U. S. 33; *Hammer* v. *Dagenhart*, 247 U. S. 251.

[19] E. g., *Ex parte Young*, 209 U. S. 123; *Ex parte La Prade*, 289 U. S. 444.

[20] E. g., *School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94, 110; *Baldwin Co.* v. *Robertson*, 265 U. S. 168; *American Steel Foundries* v. *Robertson*, 262 U. S. 209.

Special reliance is placed by petitioner upon *Ex parte Young,* 209 U. S. 123, and *Philadelphia Company* v. *Stimson,* 223 U. S. 605. Those cases did not, of course, overrule or modify the previously announced basis upon which suits against Government officers were entertained, as explained in the *Poindexter* and *Ayers* cases, *supra.* See *Old Colony Trust Co.* v. *Seattle,* 271 U. S. 426, 431–432 (where this Court cited and relied upon both the *Poindexter* and *Stimson* cases); *Ex parte La Prade,* 289 U. S. 444, 455. The argument of petitioner is based on the fact that in the *Young* case the defendant officer was threatening to prosecute the plaintiff and in the *Stimson* case to create a cloud on the plaintiff's title; that the only person in a position to make such a threat was a public officer; that thus it is unnecessary, in suits against officers, to show that the defendant is threatening an action which, if he were a private person, would render him answerable to the plaintiff; and that accordingly in such suits it is not necessary to show that the plaintiff's loss results from *"the more familiar wrongs"* which "courts are accustomed to recognize and redress." (Pet. Br. 20–23.) That argument, however, ignores the elaborate reasoning which the Court in the *Young* case found necessary to reach the conclusion that the defendant was answerable. The Court there began its discussion by referring to its earlier decisions, such as the *Ayers* and *Poindexter* cases, *supra,* in which it had been held that a suit could be maintained against a

Government officer only if it were first shown that, regarded as a private person, he was committing a trespass. The Court then discussed at length (209 U. S. at 153) the question "whether the commencement of a suit could ever be regarded as actionable injury to another, *equivalent* in some cases *to a trespass* such as is set forth in some of the foregoing cases." [Italics supplied.] The Court concluded (p. 158) that the threat to commence suits under the circumstances shown was "equivalent to any other threatened wrong or injury to the property of a plaintiff which had theretofore been held sufficient to authorize the suit against the officer." Specifically, the Court observed (p. 160) that "it would be an injury to complainant to *harass it with a multiplicity of suits or litigation* generally in an endeavor to enforce penalties under an unconstitutional enactment, and to prevent it ought to be within the jurisdiction of a court of equity." [21] In short, the defendant was in fact threatening "a familiar wrong", i. e., wrongful, oppressive, and vex-

[21] Suits to restrain officers from prosecuting a plaintiff under an invalid statute cannot be maintained unless there is a real threat of *vexatious* litigation, a threat that the defendant officer will bring more than one suit. See *Spielman Motor Sales Co.* v. *Dodge*, 295 U. S. 89, 96; *Boise Artesian, etc., Water Co.* v. *Boise*, 213 U. S. 276.

In the *Boise* case the Court cited *Insurance Co.* v. *Bailey*, 13 Wall. 616, 621, where it was said that equity will intervene "to suppress oppressive and interminable litigation, or to prevent a multiplicity of suits."

atious litigation against the plaintiff, and that action was an invasion of a legally protected interest of the plaintiff.[22]

Similarly, in the *Stimson* case, the action of the defendant constituted a well-recognized form of legal injury, the creation of a cloud on the plaintiff's title. See *Lane* v. *Watts*, 234 U. S. 525, 540, where the Court said, citing the *Stimson* case, "The suit is one to restrain the appellants from an illegal act under color of their office which will cast a cloud upon the title of appellees."

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[22] Petitioner asserts that the dissenting opinion of Mr. Justice Harlan in *Ex parte Young* employs the argument which we are making (Br., pp. 21–22). The very opposite is true. Mr. Justice Harlan insisted that the cause of action must rest upon the fact that the defendant is sued as a Government officer. Upon that premise, which is the premise advanced here by petitioner, Mr. Justice Harlan reached the conclusion that the suit could not be maintained.

The majority of the Court, on the other hand (209 U. S. at 159), rejected the suggestion that the suit was founded upon the fact that the defendant "was complained of as an officer" and rested its conclusion on the fact that he was sued as an individual and was unable to justify by a valid statute his acts which constituted an invasion of plaintiff's legally protected interests.

Petitioner (Brief p. 21) asserts that "the point driven home" in the *Young* case "is the substantial nature of the consequences." That is, indeed, an indispensable but a different factor in such a case; since an injunction is sought, the court requires a showing that "the danger of irreparable loss is both great and immediate." *Fenner* v. *Boykins*, 271 U. S. 240, 243–244; *Hygrade Provision Co.* v. *Sherman*, 266 U. S. 497, 500–503.

The burden of petitioner's argument is that in cases like the *Young* and *Stimson* cases no private individual was able to threaten the wrong to the plaintiff. It is true that in those cases the officers, being the only persons named in the statute, were the only persons who happened to be in a position to threaten the challenged acts. But nothing turns upon that fact. The standing of the plaintiff would have been the same had the statute authorized a private individual to bring vexatious litigation or to create a cloud upon title. In such a situation the defendant would be obliged to justify his conduct, precisely as in the case of the officers in the *Young* and *Stimson* cases, by showing that the statute was constitutional. Cf. *Kentucky Whip & Collar Co.* v. *Illinois Central Railroad Co.*, 299 U. S. 334. And the same would be true in a suit against the sovereign where it was acting and had consented to be sued.

Petitioner states (Br. p. 23): "The rule is no different when the injury flows from an unauthorized use of the spending power." We do not take issue with that contention. We do not assert that there is anything unique or sacrosanct about the acts of officers when spending pursuant to an appropriation statute, or that such acts or such statutes are immune from judicial review. We do not assert that a citizen may not attack an exercise of the spending power as invalid if it involves, in petitioner's phrase, a "familiar wrong" to the citi-

zen; or that a decision in favor of the respondent in these cases will establish any contrary precedent, or what the petitioner in the *Duke* case refers to as an "entering wedge." (Brief in No. 397, p. 48). Petitioner would have standing to assert the invalidity of appropriation statutes if, pursuant thereto, a defendant officer were threatening, for instance, to spend federal funds to employ men to trespass upon its property, or to organize a boycott against it, or to defame its business or to place a cloud upon its title to property. No such situation is presented in the cases at bar.

Petitioner contended also in the court below that if it is without standing to complain, Congress will be able, without the possibility of judicial scrutiny, to make appropriations to foster competition between favored private citizens and other private citizens. That question is likewise not before the Court. It may be suggested, however, that in such circumstances it is not impossible that a State might be in a position to maintain a suit, not because of financial loss to the competitor, but on the ground that if the statute were invalid the quasi-sovereign functions of the state would be infringed. Cf. *Colorado* v. *Toll,* 268 U. S. 228, 230.

Petitioner insists that the United States and its officers owe every citizen a duty not to violate any provision of the Constitution and to see to it that officers do not act in violation of statutory authority. That there is such a duty cannot be questioned.

But, absent an invasion of a citizen's legally protected interests, the breach of that duty does not give rise to a justiciable controversy. Where such a justiciable controversy does not exist, the redress for the violation of that duty does not lie in the courts. Cf. *Pacific Telephone Co.* v. *Oregon,* 223 U. S. 118; *Luther* v. *Borden,* 7 How. 1, 44; *Georgia* v. *Stanton,* 6 Wall. 50; *United States* v. *San Jacinto Tin Co.,* 125 U. S. 273.

Petitioner cites in support of its position (Br. p. 23) *Frothingham* v. *Mellon,* 262 U. S. 447, and, quoting therefrom, argues that a complainant need show only that the statute is invalid and "that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally." For present purposes the critical words in this passage are "direct injury." The error of petitioner is in applying those words as if they were "direct damage." Only if the complainant can show legal injury, and not merely loss or damage, will the court consider whether the justification can rest upon the authority of a valid statute. Only in such a case is the court called upon to exercise "the negative power to disregard an unconstitutional enactment, which otherwise would stand in the way of the enforcement of a legal right." 262 U. S. at 488. This is not such a case.

4. *The authorities relied on by petitioner, not involving lawful competition, but dealing with coercion or fraud or malice, have no application*

It is not our position (cf. Pet. Br. 24–26) that a complainant can never hold a defendant liable where any lawful act of a third person intervenes between the action of the defendant and the resulting loss to the complainant. Our position is that where the intervening act consists of voluntary and lawful competition which is the immediate cause of the complainant's loss there is no standing to complain that the defendant has made possible the loss by acts which are in excess of his lawful authority. This principle rests, not upon a lack of a causal relation in fact between the defendant's act and the complainant's loss, but upon grounds of legal policy or legal liability frequently stated in terms of legal cause. The authorities cited by petitioner, which in various circumstances have held a defendant liable despite the intervening lawful act of a third party (pp. 24–26), are thus in no sense an answer to our position. The decisions cited by petitioner do not involve loss occasioned by voluntary and lawful competition, and indeed most of them involve the special element of coercion or fraud or malice. It is plain that they can have no application here.

In the cases at bar the action of the cities is in no way coerced. The District Court expressly so found (Findings 35, R. 1, 462–463). Each city acted

voluntarily in electing to seek Federal financial aid for the construction of a competitive power system rather than for the construction of other types of eligible projects. See pages 29–32, *supra*. And, of course, the mere offering of loans and grants to the cities did not operate to coerce them. *Steward Machine Co.* v. *Davis*, decided May 24, 1937, No. 837. See also the discussion, *infra*, pp. 157–171, in relation to the Tenth Amendment. It is clear from the cases already discussed (pp. 77–85, *supra*), in which without exception relief has been denied against an officer whose act made possible competition, that the making possible of lawful competition cannot be regarded as the equivalent of coercion.

Since there is here no coercion by the Administrator of the petitioner or its customers or the cities, cases like *Pierce* v. *Society of Sisters*, 268 U. S. 510, and *Truax* v. *Raich*, 239 U. S. 33 (Pet. Br. p. 22) are not in point. In the *Pierce* case the defendant officers were threatening, by criminal prosecutions under a statute, to coerce patrons of the plaintiff to cease patronizing the plaintiff's school; such coercion was unlawful unless the statute, which authorized and therefore justified those prosecutions, was constitutional; the validity of the statute was therefore a relevant issue. *Truax* v. *Raich* involved similar coercive threats against plaintiff's employer to prosecute him criminally unless he discharged the plaintiff. *Hammer* v. *Dagenhart*, 247 U. S. 251, and *Terrace* v. *Thompson*, 263 U. S. 197, were similar. Absent a valid

statute justifying such threats, the plaintiff in those cases had a cause of action for a familiar wrong, like that of the plaintiff in *Duplex Printing Press* v. *Deering*, 254 U. S. 443, cited in the *Pierce case*, 268 U. S. at 536.[23]

Similarly, the cases dealing with fraudulent or malicious inducement are beside the point. The argument of petitioner based upon the asserted improper purpose of the Administrator is untenable, since, regardless of the Administrator's purpose, the effect of the loans and grants in causing loss to the petitioner will be the same; therefore an argument based upon the Administrator's alleged motive or purpose is reduced to an argument based simply upon the consequences of the Administrator's action. Furthermore, it is clear from the authorities that even a malicious or malevolent purpose or motive will not make conduct actionable which would otherwise be non-actionable unless that is the sole purpose or motive, or unless it is coupled with fraud. See *Beardsley* v. *Kilmer*, 236 N. Y. 80, 90; *Holbrook* v. *Morrison*, 214 Mass. 209.[24] This Court has used the phrase "disinterested malevolence" to describe an exclusively mali-

[23] *United States Fidelity & C. Co.* v. *Millonas*, 206 Ala. 147, and *Gibson* v. *Fidelity & Casualty Co.*, 232 Ill, 49 were cases in each of which the defendant insurance company was held liable because it used coercion (the threat of cancelling an insurance policy) to force plaintiff's employer to discharge plaintiff in order to compel him to settle his claim against the defendant.

[24] *Walker* v. *Cronin*, 107 Mass. 555, involving a labor dispute, is cited in *Holbrook* v. *Morrison*, *supra*, and, in the light of that case must be deemed to be limited in scope.

cious motive or purpose, and has defined the term as meaning "doing a harm malevolently, for the sake of the harm as an end in itself." *Aikens* v. *Wisconsin,* 195 U. S. 194, 203, 206; cf. *American Bank and Trust Co.* v. *Federal Reserve Bank,* 256 U. S. 350. Since at most the petitioner's contention is that the Administrator desired to benefit consumers through the reduction of power rates, and that the necessary consequence of such reduction would be harmful to the petitioners, there being no contention that the Administrator was acting out of a desire to harm petitioner for the sake of the harm as an end in itself, it is clear that on no possible assumption can the cases at bar be brought within those cited by petitioner. And especially is that true since, as shown above (p. 14), petitioner itself concedes that the alleged policy (or plan or intention or motive) of the Administrator is irrelevant because the harm to petitioner would neither be augmented by its presence nor diminished by its absence.

The other cases cited are, if anything, even more remote. In *Hitchman Coal and Coke Co.* v. *Mitchell,* 245 U. S. 229 (as explained in *American Steel Foundries* v. *Tri-City Council,* 257 U. S. 184, 211, 212) there was involved both fraud and intimidation.[25] *Angle* v. *Chicago, St. Paul, etc. Ry. Co.,* 151

[25] Insofar as *Thacker Coal Co.* v. *Burke,* 59 W. Va. 253, is at variance with the rule of *American Steel Foundries* v. *Tri-City Council, supra,* it must be deemed to be inapplicable in this court.

U. S. 1; *Rice* v. *Manley,* 66 N. Y. 82; and *Benton* v. *Pratt,* 2 Wend. 385, clearly turn on the factor of fraud. In *Tasker* v. *Stanley,* 153 Mass. 148, the court denied recovery for persuading a wife to leave her husband, in the absence of a showing of fraud or malevolence. Holmes, J. said (p. 150):

> But, in order to make a man who has no special influence or authority answerable for mere advice of this kind because it is followed, we think that it ought to appear that the advice was *not honestly given,* that *it did not represent his real opinions,* or that it *was given from malevolent motives;* and so are all the cases. [Italics supplied.]

And in *Deon* v. *Kirby Lumber Co.,* 162 La. 671, the court made a significant distinction. There the plaintiff alleged two causes of action; first, that the defendant lumber company had threatened to discharge its employees if they had merely social or personal relations with the plaintiff or his family; and second, that the ~~plaintiff~~ DEFENDANT threatened to discharge its employees if they patronized plaintiff's competing store. The court held the first cause of action good, but not the second, because there competition justified the defendant's conduct.

In sum, nothing in the authorities cited by petitioner negatives the conclusion that no legally protected interest of petitioner will be invaded by the proposed loans and grants, and that to require the Administrator to justify his action by showing

valid statutory authority would be to establish a new doctrine of private or of public law.

II

The Proposed Loans and Grants Are Authorized by the Statutes

The petitioner maintains that the loans and grants are unauthorized by the statutes. The precise basis for this contention is not clear. It is not clear whether petitioner's argument is that the construction of a municipal electric system is not within the scope of the public works provisions enacted by Congress; or whether competitive projects are to be excluded; or whether, although Congress has determined that such projects may be included with other types in the comprehensive program of public works for the increase of employment, and although the projects in the cases at bar meet all the tests of eligibility, including financial and engineering soundness, and although the four municipalities remaining of the original ten in the cases at bar have so strongly formed their preference for these projects that for four years they have persisted in their applications, and although the loan and grant agreements are in nowise a departure from the statutes, authority is nevertheless lacking for the loans and grants.

Because of the ambiguity of the petitioner's contention, and because in our view the essential question of statutory authority is whether Congress has

authorized the inclusion of competitive power projects among the types of municipal public works projects eligible for loans and grants, it appears appropriate to turn to a consideration of that question.

First. The 1933 Act provides (c. 90, 48 Stat. 201):

> SEC. 202. The Administrator, under the direction of the President, shall prepare a comprehensive program of public works, which shall include among other things the following: (a) Construction, repair, and improvement of public highways and park ways, public buildings, and any publicly owned instrumentalities and facilities; (b) conservation and development of natural resources, including control, utilization, and purification of waters, prevention of soil or coastal erosion, development of water power, transmission of electrical energy * * *; (c) any projects of the character heretofore constructed or carried on either directly by public authority or with public aid to serve the interests of the general public * * *.

The projects are "publicly owned * * * facilities" within clause (a) of Section 202. They are projects for the "transmission of electrical energy" within clause (b). They are projects "of the character heretofore constructed or carried on * * * by public authority * * * to serve the interests of the general public," within

clause (c), inasmuch as between the years 1882 and 1927 a total of 3,814 municipally owned electric light and power projects were established. (H. B. Dorau, Changing Character and Extent of Municipal Ownership in the Electric Light and Power Industry (1929), p. 13.)[26]

Second. But the intention of Congress need not be gathered from the foregoing alone. The statute received a consistent administrative interpretation to the effect that power plants and competitive plants were authorized by the Act. This interpretation was brought to the attention of Congress. Senate Resolution No. 190, 73d Congress, approved February 15, 1934, requested the Administrator of Public Works to furnish the Senate the following information:

(1) A general survey of the Public Works program.

(2) An account of the organization of the Public Works Administration.

(3) A statement of the policies of the Public Works Administration.

(4) A statement of allotments under the Public Works Act and the number of men employed.

(5) A list of Federal and non-Federal projects approved.

(6) A list of Federal and non-Federal projects pending in the Public Works Administration at Washington and in the offices in the several States.

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[26] Not all continued to exist in 1927, the latest year cited. At that time 2,320 were in operation. *Dorau, supra*, p. 12.

In response to that resolution the Administrator submitted a letter to the Senate transmitting a report of the business of the Public Works Administration for the period ending February 15, 1934. The report was submitted on March 26, 1934, and printed as Senate Document 167, 73d Congress, 2d Session (Def. Ex. 10, separately certified). The document, 300 pages in length, contains a statement of the organization, functions, procedure and policies of the Public Works Administration, together with detailed statistical tables and lists of approved and pending projects. The tables and lists are classified basically into Federal and non-Federal projects—that is, those where the construction is undertaken by agencies of the Federal Government and those where construction is undertaken by a non-Federal agency. Appendix C of that report, pp. 124–147, contains a list of approved non-Federal projects, stating the location, type, and amount of allotment for each. In that list there are no less than 37 power projects. It is thus clear that the inclusion of power projects was made known to Congress.

A construction of the Act requiring competitive projects to be rejected would have been virtually impossible of administration and would have defeated the purpose of the statute to promote widespread employment quickly. Cf. *Graham & Foster* v. *Goodcell,* 282 U. S. 409, 421. For almost every kind of State or municipal public works project would be competitive in greater or less degree; this

is true, for example, of schools and auditoriums and bridges as well as of power plants. The decision as to the types of projects to be constructed was left to the States and municipalities, and an eligible project was not rejected because it happened to be a power plant or a competitive undertaking.

Third. The administrative construction of the statute has in effect been confirmed by no less than four subsequent Acts of Congress.

(1) Three months after the report described above, Congress enacted the Emergency Appropriation Act, fiscal year 1935, approved June 19, 1934 (c. 648, 48 Stat. 1021). In Title II of that Act a revolving fund was created out of which additional loans could be made by the Public Works Administration under the provisions of Title II of the National Industrial Recovery Act. 48 Stat. 1056. The making available of these additional amounts after receiving the Administrator's report constituted Congressional approval of the administrative interpretation of the statute. Cf. *United States* v. *Midwest Oil Co.*, 236 U. S. 459, 480–481; *United States* v. *Arizona*, 295 U. S. 174, 186. In the *Midwest Oil Co.* case, the Court, discussing a report of the Secretary of War in response to a Senate Resolution, said (p. 481):

> Congress with notice of this practice and of this claim of authority, received the Report. Neither at that session nor afterwards did it ever repudiate the action taken

> or the power claimed. Its silence was acquiescence. Its acquiescence was equivalent to consent to continue the practice until the power was revoked by some subsequent action by Congress.

(2) The following year Congress enacted the Emergency Relief Appropriation Act of 1935, approved April 8, 1935 (c. 48, 49 Stat. 115), which continued the existence of the Public Works Administration and authorized continuance of its functions. While the bill was under consideration in the Senate an amendment was introduced to limit the projects undertaken to those which would not compete with existing private enterprise. 79 Cong. Rec. 3972. The proposed amendment read as follows:

> SECTION ——. Public projects, Federal, State, or municipal, undertaken pursuant to this joint resolution, shall be selected and planned so that when completed they shall not compete with existing private enterprises.

The amendment was rejected. 79 Cong. Rec. 3973. The debates on that amendment show that competitive power projects were among those to which it would have applied. See Appendix, pp. 78–85. The argument of petitioner is therefore an attempt to write into the Act a limitation which Congress specifically declined to impose. *Cf. United States* v. *Elgin, J. & E. Ry. Co.*, 298 U. S. 492, 500.

(3) The next Act of Congress bearing upon the construction of the provisions in question is Title II of the First Deficiency Appropriation Act, fiscal year 1936, approved June 22, 1936, c. 689, 49 Stat. 1597, 1608. While the bill was under consideration, the Administrator testified at length before a subcommittee of the Senate Committee on Appropriations and pointed out that loans and grants had been made for projects like that in the case at bar and that revenue bonds had often been accepted. (Hearings before Subcommittee of Committee on Appropriations, U. S. Senate, May 18, 1936, on First Deficiency Appropriation Bill, 1936, at pp. 11, 19, 15.) In the debates on the floor the proponent of a provision, which was adopted, removing any time limit on projects enjoined by court order, directed attention to a typical case of an injunction obtained by a power company against a proposed municipal electric project. (See Appendix to this brief, pp. 91–92.) Moreover, prior to that time, on January 16, 1936, a Senate Resolution had been adopted directing the Administrator to report to the Senate "a list of all projects involving the generation, transmission, or distribution of electric power * * * and to include in such report which projects * * * have been delayed because of injunction or other litigation." On March 6, 1936 (while the 1936 Act was being debated and prior to the adoption of the proviso), such a list was transmitted (74th

Cong., 2d Sess., Sen. Doc. No. 184). It stated, *inter alia* (p. 2): "Almost all the suits have been brought by private power companies who fear the competition which such publicly owned facilities will provide either directly or as a comparative standard * * *. One case, in which the Public Works Administrator is included as a party, has been tried on the evidence and argued before the upper court (*Duke Power Co. et al.* v. *Greenwood County et al., and Harold L. Ickes.*)" [27]

The Act provides (c. 689, 49 Stat. 1609):

> In order to increase employment by providing for useful public-works projects *of the kind and character for which the Federal Emergency Administrator of Public Works* (hereinafter called the Administrator) *has heretofore made loans or grants* pursuant to title II of the National Industrial Recovery Act or the Emergency Relief Appropriation Act of 1935, the Administrator may, upon the direction of the Presi-

[27] Less than a month after the enactment of the Emergency Relief Appropriation Act of 1935, the Senate had passed a resolution approved May 1, 1935, Sen. Res. 123, 74th Cong., 1st Sess., directing the Federal Power Commission to furnish to the Senate a list of all the publicly owned electric plants, Federal, State, county, or municipal, in which the installation, organization, or operation of such plants has been interfered with by restraining orders or injunctions in Federal or State courts. The response to this resolution, Sen. Doc. 182, 74th Cong., 2d Sess., March 5, 1936, points out that 25 cases were pending in the District of Columbia and 37 elsewhere involving plants proposed to be financed by the Public Works Administration (p. 25).

dent, use not to exceed $300,000,000 from funds on hand or to be received from the sale of securities, for the making of grants, to aid in the financing of such projects: *Provided,* That no part of the sum made available by this paragraph shall be granted for any project unless, in the determination of the Administrator, the completion thereof can be substantially accomplished prior to July 1, 1938, and adequate provision has been made or is assured for financing such part of the entire cost thereof as is not to be supplied through the Federal Emergency Administration of Public Works: *Provided further,* That this limitation upon time shall not apply to *any project enjoined in any Federal or State court: Provided further,* That in no case shall the amount of the grant exceed forty-five per centum of the cost of the project. * * * [Italics supplied.]

The express provision concerning projects enjoined in Federal or State courts not only discloses a recognition of the fact that competitive projects had been undertaken but also constitutes Congressional approval of such action.

That Congress approved the interpretation placed upon the Act by the Administrator is made clear also by the above-quoted words of the 1936 Act, which speak of "useful public-works projects of the kind and character for which the * * * Administrator * * * has heretofore made loans or grants pursuant to title II of the National Industrial Recovery Act or the Emergency Relief Appropriation Act of 1935." The Chairman of

the House Committee on Appropriations explained that the purpose of this provision "is to enable the Public Works Administration to follow a well-beaten path by providing aid in financing a non-Federal Public Works program." (See Appendix, p. 94.)

(4) The final Act of Congress in this series is the recent Public Works Administration Extension Act of 1937 (Title II, Public Res. No. 47, 75th Cong.). Section 201 provides:

> * * * All provisions of law existing on June 29, 1937, and relating to the availability of funds for carrying out any of the functions of such Administration are hereby continued until July 1, 1939, * * *.

The legislative background of this Act, like that of the prior Acts, demonstrates that competitive power projects were sharply brought to the attention of Congress and that the action of the Administrator in making loans and grants for such projects was approved by Congress.[28]

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[28] Senate Resolution 82, 75th Cong., 1st Sess., requested certain agencies, including the Public Works Administration, to submit a statement of all cases in which injunctions, restraining orders, or other judgments have been issued, rendered, or denied by the Supreme Court or inferior Federal courts since March 4, 1933. In response to this resolution, the Assistant Administrator of the Public Works Administration submitted on March 1, 1937, a report (S. Doc. No 27, 75th Cong., 1st Sess.) on pages 5–6 of which is a summary of the litigation involving the Alabama projects.

Among the several bills which were introduced in the 75th Congress to continue the Public Works Administration was

It is to be noted that Congress did not require that public works projects should be competitive; it provided that federal aid for such projects should not be denied merely because when completed and operated they would be competitive with existing private enterprise. And it should further be noted that this was precisely the interpretation which the Administrator put upon the statute—and not only with respect to projects in general, but with respect to power projects in particular, for the record shows that at least two-thirds of the power projects for which allotments had been made are non-competitive (Fdg. 40, R. I, 464–465).[29]

III

The Statutes Are Not Invalid as a Delegation of Legislative Power

The Circuit Court of Appeals for the Tenth Circuit, in *Kansas Gas & Electric Co.* v. *City of Independence,* 79 F. (2d) 638, and the Circuit Court of Appeals for the Fourth Circuit, in *Greenwood County* v. *Duke Power Co.,* 81 F. (2d) 986, 91 F.

H. R. 5943. In testifying on this bill before the Subcommittee of the House Committee on Appropriations, on May 3, 1937, the Federal Emergency Administrator of Public Works referred to 63 power and gas projects involved in litigation. The Alabama projects are specifically mentioned. (p 11).

[29] In July 1933, it was announced that preference for grants would be given to regenerative projects such as waterworks, sewer and sewage-disposal systems, highways, bridges, tunnels, and "projects for the transmission of electric energy into territories not now served." (Pl. Ex. 119, R. II, 362, 374).

(2d) 665, pending on certiorari, have held that the statutes involved satisfy the requirements concerning delegation of legislative power to the executive. On that issue there was no dissent. Those decisions were reached after full consideration of this Court's decisions in *Panama Refining Co.* v. *Ryan*, 293 U. S. 388 and *Schechter Corp.* v. *United States*, 295 U. S. 495.

Before turning, however, to a discussion of the question of delegation of power as such, we wish to call attention to the effect of the series of Congressional enactments discussed above (pp. 104 to 113) as constituting Congressional confirmation and approval of the action of the Administrator here in issue. Since this view, if sound, makes it unnecessary to decide the constitutional question concerning delegation of power, we present it at the outset.

1. Congress has confirmed and approved the action taken by the Administrator and challenged in these cases

What has been shown above (pp. 106 to 113) in demonstrating that the projects in question are authorized by Congress indicates that there has been full, repeated and continued disclosure to Congress of the action taken by the Administrator and that Congress has legislated in the light thereof. We have shown that on four separate occasions after the passage of the 1933 Act, Congress, with full knowledge of allotments for projects such as these, continued the functions of the

Public Works Administration and three times made additional appropriations therefor. We wish to call special attention to the latest steps in that series of enactments. On January 16, 1936, Senate Resolution 235 was passed, which directed the Administrator to report to the Senate "a list of all projects involving the generation, transmission, or distribution of electric power, and all projects for the production and distribution of gas, for which allotments have been made by the Public Works Administration, and to include in such report which projects are under construction, and those which have been delayed because of injunction or other litigation." In response to that Resolution a report was submitted by the Administrator on March 6, 1936, and is printed as Senate Document 184, 74th Congress, 2d Session. That report contains a list of all approved non-Federal electric power projects as of February 15, 1936, including the amount of the allotment for each and its status in litigation. *Each of the projects involved in the present cases appears in that list, at page 3.*

After the receipt of this report, Congress enacted the First Deficiency Act, fiscal year 1936, approved June 22, 1936. Title II of that Act (49 Stat. 1608, 1609) authorizes additional expenditures by the Public Works Administration and provides that the limitation upon time with respect to projects financed thereunder shall not apply in the case of projects enjoined in any State or Fed-

eral court. And on June 29, 1937, the Public Works Administration Extension Act of 1937 was approved (Appendix, p. 39). The enactment of these statutes in these circumstances constituted Congressional approval and ratification of the proposed loans and grants enumerated in the Administrator's report. In a comparable situation this Court recently said: "Congress has made appropriations for the benefit of the project of which it is a part and so recognized and approved the building of the dam. *Wisconsin* v. *Duluth,* 96 U. S. 379, 386." *United States* v. *Arizona,* 295 U. S. 174, 186. See also *United States* v. *Midwest Oil Company,* 236 U. S. 459, 480–481, as to the effect of a report to the Senate and subsequent acquiescence by Congress.

The effect of Congressional enactments as confirmation and approval of executive action and as setting at rest any question of delegation of power, was recently considered by this Court in two cases. *Isbrandtsen-Moller Co.* v. *United States,* 300 U. S. 139, and *Swayne & Hoyt, Ltd.* v. *United States,* 300 U. S. 297. In those cases it was held that any question of delegation of power by Congress to the President to transfer certain powers to the Secretary of Commerce had been rendered moot by the subsequent recognition by Congress of the action of the President in making such a transfer. This Court held that such Congressional recognition constituted ratification of the action of the Presi-

dent. The Court went further in the *Swayne & Hoyt* case, *supra,* stating (p. 302):

> And we think that Congress, irrespective of any doctrine of ratification, has, by the enactment of the statutes mentioned, in effect confirmed and approved the exercise by the Secretary of the powers originally conferred on the Shipping Board.

We submit that the approval here was much more deliberate and specific than that found in the two cases just discussed.

It should be emphasized that the ratification here is not retroactive. That is, it does not divest any previously existing rights, nor does it confirm an illegal act which has been completely executed. Compare *Forbes Boat Line* v. *Board of Commissioners,* 258 U. S. 338. This is not a case of a "rubber stamp" approval of a *fait accompli.* These proposed loans and grants have not yet been made, and Congress was as free to have disapproved as to have approved them. In the language of the *Isbrandtsen-Moller* case, *supra,* the administrative action when ratified was still *"in fieri."* Indeed it has remained so up to the present time.

2. Congress has provided adequate standards for the expenditure of the money appropriated

"That Congress has wide discretion in the matter of prescribing details of expenditures for which it appropriates must, of course, be plain." *Cincinnati Soap Co.* v. *United States,* 301 U. S. 308, 321–322. This Court thus took occasion, at the

last Term, to place beyond dispute the constitutional validity of lump-sum appropriations. The opinion continued:

> Appropriation and other acts of Congress are replete with instances of general appropriations of large amounts, to be allotted and expended as directed by designated government agencies. A striking and pertinent example is afforded by the Act of June 17, 1902, c. 1093, 32 Stat. 388, where all moneys received from the sale and disposal of public lands in a large number of states and territories are set aside as a special fund to be expended for the reclamation of arid and semi-arid lands within those states and territories. The expenditures are to be made under the direction of the Secretary of the Interior upon such projects as he may determine to be practicable and advisable. The constitutionality of this delegation of authority has never been seriously questioned. See *United States* v. *Hanson,* 167 Fed. 881, 884–885. * * *

In the *Cincinnati Soap* case, "the uses to which the money is to be put [were] not specified" (301 U. S. at 323). In the cases at bar it is unnecessary to rest on the broad doctrine there declared, for here the statutes set forth a definite policy and impose specific limitations on the allotment and expenditure of the funds. It is unnecessary to consider, for example, whether an appropriation stating that the funds were to be used for the general welfare would be valid. An analysis of the back-

ground and terms of the statute, and of their administration, will demonstrate that, like the provisions of the Reclamation Act sustained in *United States* v. *Hanson*, 167 Fed. 881, and approved in the *Cincinnati Soap* case, they are not open to serious question on the score of delegation of legislative power.

Title II of the 1933 Act did not inaugurate the policy of the Federal Government to extend financial aid for the construction of public works projects by States and subdivisions. That policy was embodied in the Emergency Relief and Construction Act of 1932, c. 520, 47 Stat. 709. The power to make loans for such purposes was vested in the Reconstruction Finance Corporation, an administrative agency of the Federal Government. Section 201 (a) of the 1932 Act (47 Stat. 711) authorized that Corporation—

> to make loans to, or contracts with, States, municipalities, and political subdivisions of States, public agencies of States, of municipalities, and of political subdivisions of States, public corporations, boards, and commissions, and public municipal instrumentalities of one or more States, to aid in financing projects authorized under Federal, State, or municipal law which are self-liquidating in character, such loans or contracts to be made through the purchase of their securities, or otherwise, and for such purpose the Reconstruction Finance Corporation is authorized to bid for such securities: * * *

The same subsection contained requirements regarding convict labor, a thirty-hour week, and veterans' preferences.

It will be observed that the 1932 Act furnished a background of policy for the 1933 Act. As indicating that the latter was in essence a continuation of the former, the latter provided in Section 301 that the Administrator of Public Works should have access to the applications, files, and records of the Reconstruction Finance Corporation with respect to loans and contracts and the administration of funds under the prior Act. And in fact the Public Works Administration examined 526 projects turned over to it by the Reconstruction Finance Corporation. See *Report of the Administrator,* Sen. Doc. 167, 73d Cong., 2d Sess., March 26, 1934, p. 1.

The 1933 Act authorized the making of grants in addition to loans but limited the amount of the grant in any case to 30 per cent of the cost of the labor and materials employed upon the project. The 1933 Act contained more detailed requirements than did its predecessor. The Administrator of Public Works was required, under the direction of the President, to prepare a comprehensive program of public works which should include various enumerated types of projects. This requirement, contained in Section 202, includes the following pertinent provisions:

> (a) Construction, repair, and improvement of public highways and park ways, public buildings, and any publicly owned instru-

> mentalities and facilities; (b) conservation and development of natural resources, including control, utilization, and purification of waters, prevention of soil or coastal erosion, development of water power, transmission of electrical energy, * * * (c) any projects of the character heretofore constructed or carried on either directly by public authority or with public aid to serve the interests of the general public; * * * (e) any project (other than those included in the foregoing classes) of any character heretofore eligible for loans under subsection (a) of section 201 of the Emergency Relief and Construction Act of 1932, as amended, * * *.

Section 203, which authorizes the making of loans and grants, contains important limitations on the Administrator. The section opens with the clause "With a view to increasing employment quickly (while reasonably securing any loans made by the United States)." It is thus required that loans and grants shall be made as part of the program of increasing employment and that loans shall be reasonably secured. The limitation on the amount of the grant has already been noted. It thus appears that both the subject matter of the action to be taken, namely, financial aid in the construction of recognized types of public works, and the nature of the action to be taken, namely, the making of a reasonably-secured loan or a grant in a limited amount, were definitely prescribed by Congress. And the policy of Congress that unem-

ployment be relieved and that a comprehensive program of public works be undertaken is left in no doubt whatever.

The express limitations which have been outlined necessarily include others which it is important not to overlook. Chief among these is the fact that since either a loan or a grant is a consensual transaction, the State or subdivision must apply therefor. In short, the choice of projects among those authorized by the Act is vested in the first instance not in the Administrator but in the local applicant. Since the applicant is a sovereign, there is required appropriate public action on its part. This outstanding limitation on the power of the Administrator cannot be too strongly emphasized. Not only must the applicant seek the project by appropriate action, but it must appear that its obligation to repay a loan is legally sound under local law. Furthermore, the project must also be sound from an engineering or technical standpoint, in order that a loan may be secure.[20] These constitute additional and essential limitations on the power of

[20] The requirement that loans be reasonably secure is not affected by Section 203 (d) of the 1933 Act, which empowers the President to extend any of the benefits of the statute to any State, county, or municipality notwithstanding any constitutional or legal restriction or limitation on its right or power to borrow money or incur indebtedness. To interpret this subsection as permitting waiver of the requirement of reasonable security would render that requirement nugatory, and such a construction is therefore not to be assumed. In fact, no such construction has been given to this subsection. In Circular No. 1, of the PWA, issued July 31, 1933, it was explained that this provision is related to the leasing pro-

the Administrator. Section 206, moreover, requires that all loans and grants pursuant to the Act shall contain specified provisions designed to insure the maintenance of carefully designated labor standards in connection with the work of construction.

In view of the policy and standards and limitations thus laid down by Congress, it is difficult to escape the conclusion of the Circuit Court of Appeals for the Tenth Circuit in the *Kansas Gas Co.* case, *supra,* which was quoted and adopted in the *Duke* case, *supra,* by the Circuit Court of Appeals for the Fourth Circuit (81 F. (2d) at 995):

> Sections 203 and 206 (40 U. S. C. A., Secs. 403, 406) lay down standards as to what projects may be financed or aided by loans or grants. They must be public works projects; they must be projects included in the program; they must come within the limitations specified in section 206; a loan or grant must be made with a view to increasing employment quickly, and a loan must be reasonably secured.

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vision of the Act, which authorizes the Administrator to purchase property or securities and to lease such property to a municipality. See Pl. Ex. 119, R. II, 366–367. In fact, Section 203 (d) has never been put into effect (Fdg. 50, R. I, 468; R. II, 514). In these circumstances the Court will not consider what the effect would be if this provision were construed to waive the requirements as to reasonable security for loans. See *Edelman* v. *Boeing Air Transport*, 289 U. S. 249, 253; *Pacific Tel. & Tel. Co.* v. *Seattle*, 291 U. S. 300, 304; *Stephenson* v. *Binford*, 287 U. S. 251, 276–277.

One of the loans and grants here involved (to Decatur) will be made with funds whose expenditure is authorized by the 1933 Act. Three (to Hartselle, Russellville, and Guntersville) are authorized by the Emergency Relief Appropriation Act of 1935. (Conclusion of Law No. 11, R. I. 470.) The 1935 Act provided in Section 12 that the Public Works Administration should continue until June 30, 1937, and authorized that Administration to perform such of its functions under the 1933 Act as might be authorized by the President. By Executive Order No. 7064, June 7, 1935, the President authorized the Administrator to continue to perform all the functions which he was authorized to perform under the 1933 Act. The 1935 Act made an additional appropriation, including the following:

> (g) loans or grants, or both, for projects of States, Territories, Possessions, including subdivisions and agencies thereof, municipalities, and the District of Columbia, and self-liquidating projects of public bodies thereof, where, in the determination of the President, not less than twenty-five per centum of the loan or the grant, or the aggregate thereof, is to be expended for work under each particular project, $900,000,000;

The amount thus authorized could be increased by the President by an amount not to exceed 20 per cent of the total appropriation in the 1935 Act.

The above-quoted provisions of the 1935 Act must be read in the light of the Congressional

policy and administrative practice under the 1932 and 1933 Acts. While the amount of grants was increased by the Public Works Administration from 30 per cent to 45 per cent of the cost of labor and materials on a project, the same standards under which the Public Works Administration had been operating continued to be followed. That this was the intention of Congress is made clear by the subsequent First Deficiency Appropriation Act, fiscal year 1936, June 22, 1936 (c. 689, 49 Stat. 1597, 1608). That Act authorized the use of a revolving fund for grants in an amount not exceeding 45 per cent of the cost of a project, "in order to increase employment by providing for useful public work projects of the kind and character for which the Federal Emergency Administrator of Public Works (hereinafter called the Administrator) has heretofore made loans or grants pursuant to Title II of the National Industrial Recovery Act or the Emergency Relief Appropriation Act of 1935." It should be noted that the 1935 Act imposed an additional requirement that at least 25 percent of the amount of the loan or grant must be used for work under each project; and that the President must so determine.

In the light of these statutory requirements, the discretion left to the Administrator in making loans and grants is seen to be no broader than that which is customarily vested in administrative agencies. The discretion consists largely of the segregation of a lump sum appropriation for particular

types of projects, subject to the requirements of a comprehensive program of public works; the determination of the amounts of a particular loan and grant, respectively, subject to the requirement of adequate security for the loan and a maximum proportion for the grant; and the details of the contract to be executed between the United States and the applicant, subject to the requirements concerning conditions of labor in the construction work. To those familiar with the functions of such administrative agencies as the Interstate Commerce Commission, the Federal Tariff Commission, and the like, this area of discretion will appear to be relatively limited.

Only by ignoring these limitations could the petitioner reach the startling conclusion that "In sum the legislation says bluntly that whenever a public body wants to do a 'thing' the President in his discretion may finance that 'thing'" (Pet. Brief, p. 45).

This challenging assertion of petitioner calls for a concrete test. Suppose that the Administrator were especially desirous of promoting municipal operation of gasoline stations (cf. Pet. Br., p. 46). Obviously he would be powerless to act in that direction until financial aid was sought by an applicant for such a project. But suppose, for example, that the City of Decatur, instead of applying for a loan and grant for a power plant, wished to enter upon the business of operating gasoline stations. Suppose that the city proposed to purchase an ex-

isting privately owned station and accordingly requested a loan and grant from the Administrator for that purpose. That, in the words of petitioner, is the "thing" which the city "wants to do." May the Administrator in his uncontrolled discretion make the loan and grant? Obviously not. The short reason is that there is no authority conferred on the Administrator to finance the purchase of an existing enterprise but only to aid in financing construction. Suppose, then, that the city changes its plans to provide for the construction of a gasoline station. May the Administrator finance it? On those facts, no. Such an undertaking may not be a public purpose under the law of Alabama, and hence the obligation of the borrower would be legally unsound. But suppose that such an undertaking were a legitimate public purpose in Alabama for which taxes might be levied. If the city has reached its debt limit, its obligation to repay the loan would still be legally and financially unsound. But suppose that the city changed its plan and proposed to issue revenue bonds payable solely from the earnings of the project. The city would have to show legal authority to issue revenue bonds for

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[31] The Alabama statute under which the cities propose to issue bonds for the present projects is limited to electric systems. Ala. Laws, Extra session 1933, No. 107. A separate statute authorized the issuance of revenue bonds for waterworks, sewer, and gas systems, but provided that the construction of gas and water systems could not be undertaken where a privately owned system was in operation. *Id.*, No. 102.

that type of project under Alabama law.[31] But suppose Alabama enacted a statute authorizing revenue bonds to be issued for that type of project. Still the Administrator would have to be satisfied that the bonds were reasonably secure on the basis of prospective earnings. And under the 1935 Act it would have to be determined that at least 25 per cent of the loan would be expended for work under the project.[32]

It should be apparent that the petitioner has given a highly unreal picture of the discretion left to the Executive in connection with loans and grants for non-Federal projects. In support of that unreal picture petitioner quotes certain language used by the Administrator in describing the problems which faced the Public Works Administration at the outset (Pet. Br., pp. 37–38). Those statements were obviously meant to stress the difficulty and complexity of the problem of preparing a comprehensive program of public works as required by the statute. The head of any administrative agency would be likely to make similar statements in recalling the magnitude of its tasks and its accomplishments. In fact, the First

[32] This limitation does not mean that 25 per cent of the loan must be expended for work at the site. Neither does it mean that this amount may be expended so that ultimately at least 25 per cent will go to labor, no matter how remotely connected with the project. The meaning is that at least 25 per cent must be expended for work at the site and for work in the extraction, fabrication, and transportation of the materials which go into the project. See Appendix pp. 85–88.

Annual Report of the Federal Radio Commission contains very similar statements." But the present cases are not to be decided by rhetorical or metaphorical discussions of that sort. What is required in this connection is an analysis of the standards laid down by Congress (an analysis such as has been outlined above), together with an examination of the actual administration of the statute.

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[11] The Report, for the year 1927, states:

"The passage of the radio act of 1927 presented a situation without parallel in the history of American executive departments" (p. 1).

The Report quotes (p. 6) from an address by Commissioner Bellows as follows, under the heading "An Appalling Responsibility":

"* * * Nor do I know of any other law which, like the radio act of 1927, sets up as the sole guide for the body charged with its administration the interest, convenience, or necessity of the public. That, in just four words, is what Congress has told us to do. We are to determine who shall and who shall not broadcast and how such broadcasting shall be carried on, simply in accordance with our conception of public interest, convenience, or necessity.

"It is a rather appalling responsibility.

* * * * * * *

"* * * We can not evade this responsibility, for it is the thing which Congress has told us we must do, and it is the thing which the people of America rightly demand shall be done. The variety of broadcasting service has become infinite; how shall we measure the conflicting claims of grand opera and religious services, of market reports and direct advertising, of jazz orchestras and lectures on the diseases of hogs!"

Compare the decision sustaining the grant of power. *Federal Radio Comm'n v. Nelson Bros. & Co.*, 289 U. S. 266.

Petitioner proposes to make an examination of subsequent experience under the statutes (Pet. Br., pp. 42–44). On pages 42–43 of the brief is listed a number of projects for which allotments were made, as listed in the Administrator's report in March 1934 (Def. Ex. 10, separately certified). In the first place, most of the examples cited are examples of Federal projects, which are subject to different tests, and which are not in issue here. In the report itself these projects are segregated from the non-Federal projects. The Federal projects are listed in the report at pp. 18–123, according to the Federal Departments involved. The appropriation to the Civil Works Administration, referred to in petitioner's brief at p. 43, was likewise a federal project from the standpoint of the Public Works Administration. Whether any particular activities undertaken by the Civil Works Administration with the funds thus allocated to it were outside the proper scope of the statute is a question which does not concern us here.[44] Of the *non-fed-*

[44] We cannot, however, let pass unchallenged the petitioner's reference (Br., p. 44) to the Civil Works Administration. The brief refers to a report of the Federal Emergency Relief Administration (not to be confused with P. W. A.) for examples of projects which in the opinion of petitioner could not properly be regarded as public works projects in any limited sense. In the interest of accuracy, it must be pointed out that petitioner's selection (Br., p. 44) of a few projects listed, without indicating their relationship to the major classifications of civil works projects, is highly misleading. The report itself classifies the projects in ten groups, viz (p. 18): streets, roads, and highways; schools and univer-

eral projects listed in the report, over 1,800 in number (pp. 124–127 of the report), petitioner has selected ten which appear to it to be novel and per-

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sities; parks and playgrounds; public buildings and equipment; improvement to public lands; pest control; sanitation; waterways and water supply; utilities; administrative, professional, and clerical. Thus what petitioner designates as "painting guard rails and fences" is in fact described in the report as "constructing and painting guard rails and fences," and is one of 15 types of work confined to the classification "Streets, Roads, and Highways." The other examples are likewise given in a misleading manner.

Also, petitioner fails to quote from the report the following important explanation (Monthly Report of the Federal Emergency Relief Administration, Dec. 1–31, 1933, p. 17):

"A large number of employable persons on relief were not qualified for work that fell within the scope of the Civil Works program proper and which could be paid for from the Public Works funds made available for this administration. To meet this situation a Civil Works service program was set up for persons employed on projects relating to relief offices or for the benefit of relief clients.

"The Civil Works service program is being carried forward with a maintenance of maximum identity with the Civil Works program. The funds for it are all drawn from relief sources and all persons employed on Civil Works service projects are persons eligible for relief."

The foregoing explanation indicates that the Civil Works Administration was definitely aware of the limitation upon use of funds allotted by P. W. A. It was, therefore, necessary to draw upon relief funds from other sources to finance the so-called service projects as distinguished from public works projects. The report suggests (p. 18) that the requirements as to civil works projects be relaxed by Congress so as to permit the inclusion of service projects. This, however, Congress did not do. Whether, in the administration of the civil works program, the tests of public works projects were properly applied in every case is a question outside the scope of the present litigation.

haps amusing. We suggest that the court scan for itself the list of approved non-federal projects and determine whether these ten are in fact fair examples. Such an examination will show that those ten projects are virtually unique, though we do not mean to suggest that they are improper. If in an occasional instance a public dry dock or a public fire alarm or a public silo can meet the requirements imposed by the statutes there is no reason why they should be excluded from the comprehensive program. But the various limitations discussed above would make it almost certain that they would occupy, as in fact they do, a trivial position in the comprehensive program of public works.

A fair and accurate picture of that program can be obtained, as we have said, by examining the report itself from which the petitioner has selected these illustrations. A fair and accurate picture can also be obtained by reference to the more recent testimony of the Administrator during the hearings on the First Deficiency Appropriation Bill, 1936, H. R. 12624, 74th Cong., 2d Sess., before a Sub-Committee of the Senate Committee on Appropriations. In that testimony the Administrator submitted a schedule of non-federal projects theretofore approved, classified according to type. We have already set out (pp. 12–13, *supra*) the table there given, and it will not be reprinted here.

Upon examining the list the Court will, we submit, be impressed, not with the novelty or strange-

ness of the types of projects, but rather with their familiar and well-recognized character as public works in the traditional and well-established sense.

The fact that academic writers or foreign countries have suggested or found that the concept of public works may be expanded and strained to include virtually all sorts of work and services can not alter the fact that the statutes here involved as administered and interpreted by the Public Works Administration conform to a well-established pattern of public works as States and subdivisions have long recognized them. The States and their subdivisions had traditionally undertaken public works projects such as bridges, highways, public buildings, parkways, water-works, gas plants, electric plants, and the like. What was left to the Administrator was simply to coordinate into a comprehensive program such of these projects submitted by States and subdivisions as were eligible for financial aid under the requirements and limitations imposed by Congress.

The fact is that, so far as delegation is concerned, a major element of discretion was reposed, not in the Administrator, but in the States and subdivisions themselves. The petitioner does not suggest that there has been an improper delegation of power by Congress to the States. Such a contention would of course be untenable. *Clark Distilling Co.* v. *Western Maryland Railway Co.*, 242 U. S. 311, 326. The function of the Administrator

was to apply the tests of eligibility laid down by Congress and to coordinate eligible projects into a nation-wide and diversified program. It is this element of discretion which the plaintiffs must show violates the limits permitted by the Constitution.

An answer more than adequate has been given by this Court in the *Cincinnati Soap* case, *supra*.

Essentially, the argument of petitioner is an argument of legislative policy, not of constitutional law. The degree of particularity with which appropriations are made is a matter as to which both power and responsibility have been left to Congress. The question has been debated as one of policy since the first administration under the Constitution, with Hamilton, Jefferson, and Gallatin taking leading parts in the celebrated controversy.[35] More recently, in connection with the movement for an executive budget, the question of policy again came to the fore, and in 1912 President Taft approved and submitted to the House a report of the Commission on Economy and Efficiency on the need for a national budget (House Doc. 854, 62d Cong., 2d Sess.), which suggested that the practice of enacting detailed appropriation measures was unwise and at variance with the fiscal practice contemplated by the Constitution (*id.* at 72). A recurring argument in favor of greater executive control

[35] See Gallatin, *Writings* (Adams ed.) III, 73, 117; Hamilton, *Works* (Ham. ed.) VII, 532, 533, 788; Richardson, *Messages and Papers of the Presidents*, I, 329; American State Papers (Finance), 7th Cong., 1st Sess., pp. 755–757.

over expenditures, particularly pertinent in the field of public works, is the charge that a legislature is more subject to sectional influences in determining upon particular expenditures, and the conviction that the placing of greater responsibility in the executive in that regard will bring about a broader and more expert view in the financing of internal improvements. Whatever may be the merits of such considerations, the important fact remains that the question is one of policy for the legislature. There lie the "power and responsibility." Cf. *Cincinnati Soap Co.* v. *United States, supra,* at 324.

3. *There are numerous precedents in related fields*

a. Reference has already been made briefly to the provisions of the Reclamation Act of 1902, 32 Stat. 388, which set up a revolving fund for reclamation works and provided in Section 4 that "upon the determination by the Secretary of the Interior that any irrigation project is practicable, he may cause to be let contracts for the construction of the same."

It will be noted that the statute contains no direction to the Secretary of the Interior to spend any amount of money whatever. He is authorized to spend as much or as little as he deems wise, provided that the amount of expenditures does not exceed the maximum sum in the reclamation fund.

There is no test or rule laid down for the guidance of the Secretary in selecting projects, except that he must find that the project is practicable in order to make it eligible. The word "practicable" is not defined.

The constitutionality of this statute was challenged in *United States* v. *Hanson,* 167 Fed. 881 (C. C. A. 9th), on the ground that it "delegates legislative authority to the Secretary of the Interior, and authorizes him to determine what and where irrigation systems shall be built and maintained and what shall be expended thereon." Judge Gilbert, writing for the Circuit Court of Appeals for the Ninth Circuit, rejected this contention and held the statute valid. He made the following observations relative to the point under discussion (pp. 884–885):

> It is said that the appropriation is indefinite. This is true, but it is not more indefinite than other appropriations which have been made by Congress from the beginning of the government, the constitutionality of which has never been questioned.
>
> But it is urged that the act delegates legislative authority to the Secretary, in that it authorizes him to determine what irrigation system shall be built and maintained, and what amount shall be expended thereon. A similar contention was advanced in *Union Bridge Company* v. *United States,* 204 U. S. 364, 27 Sup. Ct. 367, 51 L. Ed. 523, concern-

> ing the river and harbor act of 1899 (Act March 3, 1899, c. 425, 30 Stat. 1151 [U. S. Comp. St. 1901, p. 3540]), which gave to the Secretary of War power to determine whether bridges on navigable waters of the United States are unreasonable obstructions to navigation, and providing for the removal of such bridges when so condemned by the Secretary. But the court held that the act was not unconstitutional as a delegation of legislative power to an executive officer.

This decision was cited and relied upon in the *Cincinnati Soap* case, *supra.*

The power of expenditure is closely analogous to other powers which are not essentially legislative, or law-making, in character. In such fields powers at least as broad as those here conferred have been commonly granted and never invalidated on the ground of delegation of power.

b. In the administration of the public lands it is well established that Congress has a broad power of delegation. Congress may, for example, subject the location of mine claims to state and territorial laws and to local mining customs. *Butte City Water Co.* v. *Baker,* 196 U. S. 119.

In *United States* v. *Midwest Oil Co.,* 236 U. S. 459, 474, this Court reaffirmed the doctrine of the *Butte City* case, stating that "land laws are not of a legislative character in the highest sense of the term (Art. 4, § 3) 'but savor somewhat of mere rules prescribed by an owner of property for its disposal.'" See also *United States* v. *Wilbur,* 283

U. S. 414, 419; *United States* v. *Chemical Foundation*, 272 U. S. 1, 12. In *United States* v. *Grimaud*, 220 U. S. 506, 516, the Court likened administrative regulation of the Federal forest reserves to ordinances that—

> do not declare general rules with reference to rights of persons and property, nor do they create or regulate obligations and liabilities, nor declare what shall be crimes nor fix penalties therefor.

c. In disposing of property of the United States, Congress may likewise entrust administrative officers with wide discretion. Cf. *United States* v. *Chemical Foundation*, 272 U. S. 1, 11–12; *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288.

d. In the establishment of fiscal agencies, Congress may vest a large measure of discretion in the administrative officers charged with carrying out the law. The Acts establishing the United States banks left to the directors of those institutions wide latitude such as is ordinarily reposed in officers of similar private institutions. Perhaps no power so vested in them was of greater practical importance than that of establishing branches, for thereby the impact of the bank was felt directly by competing private institutions, whose functions were in part supplanted. An extremely forceful argument was made in *McCulloch* v. *Maryland*, 4 Wheat. 316, by Mr. Hopkinson, for Maryland, to the effect that if the power to establish branches existed in the Fed-

eral Government, its exercise must rest with Congress alone (pp. 335–337):

> 2d. But if these branches are to be supported on the ground of the constitutional necessity, and they can have no other foundation, the question occurs, who should be the judge of the existence of the necessity, in any proposed case; of the when and the where the power shall be exercised, which the necessity requires? * * * The establishment of a bank in a state, without its assent; without regard to its interests, its policy or institutions, is a higher exercise of authority than the creation of the parent bank, which, if confined to the seat of the government, and to the purposes of the government, will interfere less with the rights and policy of the states, than those widespreading branches, planted everywhere, and influencing all the business of the community. Such an exercise of sovereign power should, at least, have the sanction of the sovereign legislature, to vouch that the good of the whole requires it, that the necessity exists which justifies it. But will it be tolerated, that twenty directors of a trading corporation, having no object but profit, shall, in the pursuit of it, tread upon the sovereignty of the state; enter it, without condescending to ask its leave; disregard, perhaps, the whole system of its policy; overthrow its institutions, and sacrifice its interests?

Though the argument was vigorous and extended, the Chief Justice was able to deal with it in a summary way (p. 424–425):

> The branches, proceeding from the same stock, and being conducive to the complete accomplishment of the object, are equally constitutional. It would have been unwise to locate them in the charter, and it would be unnecessarily inconvenient to employ the legislative power in making those subordinate arrangements. The great duties of the bank are prescribed; those duties require branches; and the bank itself may, we think, be safely trusted with the selection of places where those branches shall be fixed; reserving always to the government the right to require that a branch shall be located where it may be deemed necessary.

Compare also the discretion vested in the Secretary of the Treasury under the Farm Loan Act, sustained in *Smith* v. *Kansas City Title & Trust Co.*, 255 U. S. 180.

e. Perhaps the most striking example of the discretion traditionally left with the Executive in carrying out laws which are not of a regulatory or coercive nature is the issuance of obligations of the United States. The power to borrow money on the credit of the United States is, of course, a power vested in Congress by the Constitution. Yet in authorizing the Secretary of the Treasury to borrow money, Congress has conferred upon him ex-

tremely broad powers. The legislation is collected in Title 31 of U. S. C., Sections 752–757. The amounts which the Secretary is authorized to borrow and for which he may issue obligations extend into the tens of billions of dollars. Yet he is left wholly free to determine whether and when to issue any or all of the types of obligations authorized by the statutes. No limit is placed upon the time during which these obligations may be issued. In the case of United States notes (Section 753), certificates of indebtedness (Section 754), Treasury bills (Section 754), and war-savings certificates (Section 757), the rate of interest is left entirely at the discretion of the Secretary. In the case of bonds only a maximum rate of interest is designated. In the case of United States notes (Section 753), the Secretary is given his choice of four quite different schemes of complete or partial tax exemption. The importance of the powers thus conferred, and their effect upon the national credit, upon competitive investments in state, municipal, and private obligations, upon interest rates generally and upon the saving and investment of capital, need not be elaborated.

In these instances the powers conferred, despite their important direct and collateral consequences, were not law-making powers in the appropriate sense, such as were those involved in the *Panama* and *Schechter* cases. The same is true of the power to segregate lump-sum appropriations in the cases at bar.

In the cases at bar there is, finally, the important fact that only by vesting in administrative officers the discretion conferred could the power of Congress be effectively exercised. As was said by Judge Parker in the *Duke Power Co.* case, 81 F. (2d) 994:

> It was out of the question for Congress to prescribe the details of an extended program of public works. It appropriated the money for the purpose, laid down the principles which were to guide the President and the Administrator of Public Works in its expenditure, and left to them the working out of the details. The making of loans and grants in carrying out the policy thus laid down by Congress is the exercise of administrative, not legislative, discretion.

This Court has repeatedly recognized that

> Without capacity to give authorizations of that sort we should have the anomaly of a legislative power which in many circumstances calling for its exertion would be but a futility (*Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 421).

The language of the *Panama* case is particularly applicable here. To attack the right of Congress to delegate the functions which it has conferred upon the Public Works Administration is to attack in all practical sense the power of Congress to make appropriations in aid of a comprehensive program of public works for the relief of unemployment.

IV

The Statutes are Constitutional as an Exercise of the Power of Congress to Spend Public Funds to Promote the General Welfare

The conclusion that the statutes are a valid exercise of the spending power of Congress is no longer open to question, in view of the recent decisions of this Court sustaining the provisions of the Federal Social Security Act. *Steward Machine Co.* v. *Davis,* decided May 24, 1937, No. 837; and *Helvering* v. *Davis,* decided May 24, 1937, No. 910. In the *Steward* case the Court sustained the tax and credit as a means of mitigating the financial burdens assumed by the Federal Government in periods of depression; and the Court referred specifically to the sums expended by the National Government "for public works and unemployment relief":

> It is too late today for the argument to be heard with tolerance that in a crisis so extreme the use of the moneys of the nation to relieve the unemployed and their dependents is a use for any purpose narrower than the promotion of the general welfare. Cf. *United States* v. *Butler,* 297 U. S. 1, 65, 66; *Helvering* v. *Davis,* decided herewith. The nation responded to the call of the distressed. Between January 1, 1933, and July 1, 1936, the states (according to statis-

> tics submitted by the Government) incurred obligations of $689,291,802 for emergency relief; local subdivisions an additional $775,675,366. In the same period the obligations for emergency relief incurred by the national government were $2,929,307,125, or twice the obligations of states and local agencies combined. According to the President's budget message for the fiscal year 1938, the national government expended *for public works and unemployment relief* for the three fiscal years 1934, 1935, and 1936, the stupendous total of $8,681,000,000. The *parens patriae* has many reasons—fiscal and economic as well as social and moral—for planning to mitigate disasters that bring these burdens in their train. [Italics supplied.]

These recent decisions reiterated the principle expressed in *United States* v. *Butler,* 297 U. S. 1, that the choice of means in exercising the spending power rests with Congress, and that to overturn its choice the courts will require a showing that by no reasonable possibility can the challenged measure be regarded as an appropriate means to the end sought.

Petitioner must contend that, despite the judgment of Congress and expert opinion, financial aid to States and their subdivisions for a nation-wide program of public works is an inadmissible means of relieving unemployment; or that in undertaking such a program the construction of power plants

must be excluded, even though a municipal applicant chooses that type of public works project rather than some other eligible type. Such contentions are clearly untenable.

1. In 1933, when Title II of the National Industrial Recovery Act was passed, the United States was in the midst of an economic depression of unprecedented character. This Court has taken judicial notice of the depth and severity of the depression. *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States,* 284 U. S. 248, 260; *Great Northern Ry. Co.* v. *Weeks,* 297 U. S. 135, 149; *Baltimore National Bank* v. *State Tax Commission,* 297 U. S. 209; *Home Bldg. & Loan Assn.* v. *Blaisdell,* 290 U. S. 398, 422. The Federal Reserve Board index of industrial production showed a drop from 119 for 1929 to 64 for 1932.[36] The consequent unemployment was widespread and was severely undermining the economic well-being of the nation. Factory employment had shrunk from 104.8 per cent in 1929 to 62.6 per cent in May 1933, based upon the 1923–1925 volume.[37] It has been estimated that between 1929 and 1933 the number of unemployed increased from 1,864,000 to 15,653,000.[38] The re-

[36] *Federal Reserve Bulletin*, October 1936. The figures are based upon the years 1923 to 1925, as 100.

[37] *Monthly Labor Review*, May 1935, page 1339.

[38] *The American Federationist*, January 1936, p. 85. This estimate of unemployment in 1933 would appear to be conservative. The Alexander Hamilton Institute estimated that 17,000,000 were unemployed in March 1933. *Business Conditions Weekly*, September 5, 1936.

sources of private charity were unable to cope with the distress and suffering resulting from this widespread unemployment. The absolute necessity of providing public funds for the relief of the unemployed and the destitute created a financial problem of grave magnitude. By July 1933, 13 per cent of the population of this country was receiving relief from public funds.[39] The unemployment problem had become nation-wide in scope, and the states and local communities were unable to provide the necessary relief. Every section of the country was affected. Tax collections were decreasing, local revenues were dwindling, and the credit resources of states, counties, and municipalities were rapidly being exhausted.[40]

Not only was unemployment in itself a matter of the gravest importance, but it had profound effects upon the economy of the nation. The decrease of expenditures for consumption goods resulting from the unemployment of millions who theretofore had incomes, affected not only the numerous industries engaged in producing such goods, but also inevit-

[39] See Report of the Federal Emergency Relief Administrator to the Chairman of the Senate Committee on Appropriations, Sen. Doc. No. 56, 74th Cong., 1st Sess.

[40] See Report of Federal Emergency Relief Administrator (December 1933), where it is stated that on May 22, 1933, approximately 4,250,000 families (i. e., 19,000,000 persons) were receiving relief from public funds.

See also Report of Federal Emergency Relief Administrator (May 1935), Sen. Doc. No. 56, 74th Cong., 1st Sess. Ex. W., 657–719, where the status of each State in regard to need and ability to bear financial burdens for relief is given.

ably affected the purchase of the capital goods used for the production and manufacture of consumption goods. A downward spiral was in progress which had to be arrested if the nation was not to find itself in a state of utter collapse. The gravity of the situation is graphically depicted by the fact that the national income produced had shrunk from 81 billions in 1929, to 40 billions in 1932.[41] In March 1937 this Court said: "We may take judicial notice of the unparalleled demands for relief which arose during the recent period of depression and still continue to an alarming extent despite the degree of economic recovery which has been achieved." *West Coast Hotel Co.* v. *Parrish,* 300 U. S. 379, 399.

In these circumstances it cannot be doubted that Congress had the power to appropriate funds to relieve the distress of the unemployed. In so doing, two courses were open: (1) Funds could be donated to the unemployed. This was done through the Federal Emergency Relief Act of 1933 (c. 30, 48 Stat. 55) providing for Federal aid to the States for direct relief of unemployment. (2) A comprehensive program of useful public works could be inaugurated and the unemployed paid for work performed in connection with projects included in that program. Such a program would not only

[41] Estimates of the Department of Commerce, presented in *The National Income Produced, 1929–34,* by Robert K. Nathan, Chief, Income Section, Division of Economic Research, Bureau of Foreign and Domestic Commerce. (*Survey of Current Business,* November 1935.)

relieve the distress of the unemployed, but would also serve another purpose promotive of the national general welfare; namely, the increase of employment both in the actual construction of public works projects and in industries engaged in producing, manufacturing, and transporting the materials used on those projects. The second course of action was the one adopted by Congress in the enactment of Title II of the National Industrial Recovery Act.

2. In determining to engage in a comprehensive program of public works, Congress was influenced by an obvious consideration of the utmost importance. The construction industry had suffered a far greater decline than that sustained by other industries. The importance of the construction industry as an indicator of business activity has long been recognized. The immense number of workers, the amount of pay rolls, and the value of the output of this industry indicate its importance in any analysis of the economic condition of the nation.

It has been estimated that the total amount annually expended on construction in the United States, public and private, sank from a sum of considerably in excess of $12,000,000,000 in 1929, to the sum of approximately $4,000,000,000 in 1932.[42]

[42] Gayer, Arthur D., *Public Works in Prosperity and Depression* (National Bureau of Economic Research, 1935) prepared for the National Planning Board of the Federal Emergency Administration of Public Works.

Building construction in 257 cities having a total population of 44,850,000 declined from $2,933,117,531 in 1929 to $481,490,267 in 1932, a decrease of 83.6 per cent.[43] Throughout the United States employment in the construction industry, direct and indirect, decreased between August 1929 and March 1933 by more than 63 per cent. In August 1929 a total of 2,325,689 persons were employed in this industry, and in March 1933 the number had dwindled to 850,414.[44] Activity in the construction industry stimulates employment in allied industries, which put men to work in producing cement, lumber, electrical machinery, supplies, and other materials. The construction of public works is the most practical method of stimulating the construction industry.

3. The idea of a comprehensive program of public works as a means of relieving unemployment has long been recognized by practical business men and students of the problem as well as by legislative bodies both in this country and abroad. Perhaps no method of relieving unemployment has been so universally approved as this.[45]

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[43] *Building Construction*, January 1936, p. 50 (United States Department of Labor).

[44] *American Federationist* (Jan. 1936), pp. 72–73, American Federation of Labor. These figures include those employed directly and indirectly by building contractors, by builders on their own account, and by road construction companies. See also Fdg. 45, R. I, 466, and II, 542–549, for statistics on the relative decline in employment in the durable and non-durable goods industries.

[45] *Economic Reconstruction*, Report of the Columbia University Commission (1931), pp. 35–37, 150–169; J. M. Clark,

During the business recession of 1921 a Conference on Unemployment was called by President Harding. It was convened by Secretary of Commerce Herbert Hoover and was attended by business men and economists from all parts of the country. Among other things, the conference ap-

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The Economics of Planned Public Works (National Bureau of Economic Research, 1935); Arthur D. Gayer, *Public Works in Prosperity and Depression* (National Bureau of Economic Research, 1935); O. M. W. Sprague, *Recovery and Common Sense* (1935), pp. 15–33; Sumner H. Slichter, "The Economics of Public Works," *American Economic Review*, supp. (1934), pp. 174–185; F. G. Dickinson, "Public Construction and Cyclical Unemployment," *Annals of the American Academy of Political and Social Science* (1928), Vol. CXXXIX, pp. 175–209; Vernon A. Mund, "Prosperity Reserve and Public Works," *Annals of the American Academy of Political and Social Science*, supp. (May 1930); Round Table Discussions on Public Works and Unemployment, *American Economic Review*, Supp. (March 1930), pp. 15–29; J. M. Keynes, *The Means to Prosperity* (1933); Gerhard Colm and Fritz Lehmann, "Public Spending and Recovery in the United States," *Social Research* (May 1936), Vol. III, p. 129.

The construction of public works as a means of combating economic depressions has been known since antiquity. It has been said that the construction of buildings on the Acropolis under Pericles was undertaken to create work for the unemployed masses. The Romans devoted their idle resources to construct not only public buildings but also water supply systems and roads, some of which still endure. More recently, the policy of retarding public works during periods of prosperity and extending them during periods of depression has been adopted by Great Britain, Canada, France, the Netherlands, and Norway. J. M. Clark, *Economics of Planning Public Works* (U. S. Government Printing Office, 1935); League of Nations, *Enquiry on National Public Works*, c. 482 M. 209, 1934 VIII.

pointed a committee, headed by Owen D. Young, to undertake an investigation into the problems arising from the conditions of unemployment then prevailing. The report of the Committee is contained in a volume entitled *Business Cycles and Unemployment*. One of its recommendations was the adoption of a policy of retarding public works during periods of business activity and accelerating them during periods of depression.

In 1931 the Employment Stabilization Act of 1931 was enacted into law. C. 117, 46 Stat. 1084. This Act provided for the preparation of a six-year schedule of Federal public works with the view of using it as a business stimulus during slack periods. On May 31, 1932, in his message to Congress urging the enactment of a bill authorizing the Reconstruction Finance Corporation to buy bonds from political subdivisions or public bodies to aid in the construction of self-liquidating public works, President Hoover said:

> I have for many years advocated speeding up of public works as relief to unemployment in times of depression. Since the beginning of this depression, in consonance with this view, the Federal Government will have expended in excess of $1,500,000,000 in construction and maintenance of one kind or another, as against a normal program of perhaps $650,000,000 for a similar period. (75 Cong. Rec., pp. 11597–11598.)

Shortly thereafter the Emergency Relief and Construction Act of 1932 was enacted, authorizing

the Reconstruction Finance Corporation, among other things, "to make loans to, or contracts with, states, municipalities, and political subdivisions of States, public agencies of States, of municipalities, and of political Subdivisions of States, public corporations, boards, and commissions, and public municipal instrumentalities of one or more States to aid in financing projects authorized under Federal, State, or municipal law which are self-liquidating in character, such loans or contracts to be made through the purchase of their securities, or otherwise." 47 Stat. 711.

The following year Title II of the National Industrial Recovery Act became law. Section 301 of this Act provided that within ten days after the date upon which the Administrator has qualified and taken office no application should be received by the Reconstruction Finance Corporation under the provisions of the Emergency Relief and Construction Act of 1932, hereinabove referred to, and that the Administrator should have access to all applications, files, and records of the Reconstruction Finance Corporation relating to such loans and contracts. It is evident that Congress considered that it was continuing, under a new administrative set-up and with supplementations, work previously authorized.

4. The results of the Public Works progra have vindicated the judgment of the Congress as to the appropriateness of the means adopted. Cf. *Legal Tender Cases,* 12 Wall. 457, 543. Every

Public Works Administration contract includes a clause making it mandatory for the contractor to report to the Bureau of Labor Statistics the number of people on his pay roll and amount of pay roll, the man-hours of work at the site of the construction project, and the expenditures for construction materials. (Fdg. 46, R. I, 467; 133; II, 550.) Since the inception of the Public Works Administration more than 14,000 projects, federal and non-federal, have been completed or are under construction, at a total cost of more than $3,000,000,000. From the inception of the program to August 1936, $755,262,389 was expended for wages and $1,371,329,589 for materials.[46] The latter expenditure will provide employment for persons away from the site of the projects in the mines, mills, factories, and shops, and on the railroads, in every corner of the nation. Studies made by the Bureau of Labor Statistics show that in three years the construction of the projects included in the comprehensive program of public works provided approximately 6,475,000 man-months of labor.[47] It is conservatively estimated that for each person put to work at the site of a project, two and one-half additional persons

[46] *Employment and Pay Rolls*, August 1936 (U. S. Department of Labor).

[47] Herman B. Byer, "Employment Created by P. W. A. Construction," *Monthly Labor Review*, October 1936, p. 838. This figure is based on a 170-hour month. On P. W. A. projects, 130 hours constitute a fulltime month of employment. Figured on the latter basis the number of man-months of work provided at the site comes to approximately

are given employment away from the site, so that it may safely be said that the Public Works Administration during the first three years of its existence has provided a total of approximately 23,000,000 man-months of employment.

5. The argument of petitioner that power plants should not have been included in the eligible types of public works is an argument addressed, not to constitutional power, but to legislative policy both of the Federal Government and of the States. Whether a power plant, or a competitive power plant, should be constructed as part of a public works program is left in the first instance to the States. On this question of policy Alabama was free to act and has done so through her legislature. Alabama has provided that municipalities may issue revenue bonds for gas and water systems only when they are non-competitive, but has imposed no such restriction on electric projects. (Ala. Acts 1933, extra session, Nos. 102, 107.

Congress, on its part, was unwilling to exclude arbitrarily this type of project from the comprehensive program. To have done so might have opened the way for similar irrational exceptions and so might have jeopardized the success of the public works program as a whole.

8,500,000. The author is Chief of the Division of Construction and Public Employment, Bureau of Labor Statistics (R. II, 542).

See also Hearings before Subcommittee of Senate Committee on Appropriations on H. R. 12624, 74th Cong., 1st Sess., May 18, 1936 (testimony of Administrator).

Congress recognized that the purchase of materials for use in the construction of public works projects would stimulate the employment of more labor than would be employed in the actual construction, and for that reason amended a proposed limitation in the 1935 statute which might conceivably have been interpreted to restrict the amount of funds available for purchase of materials. (See legislative history, Appendix, p. 78.) Petitioner's assertion that power projects involve the employment of fewer men at the site and more expenditures for purchase of materials and their transportation is therefore irrelevant. Indeed, it is to be observed that so-called indirect labor, resulting from the purchase of materials—since it involves men employed in the extraction, fabrication, and transportation of materials throughout the country—has a more pronounced effect on the national general welfare than the employment of men locally in the construction of such projects. In these circumstances the courts cannot be asked to hold that the refusal of Congress to exclude power projects was arbitrary and unconstitutional.

V

There Is No Violation of the Tenth Amendment

The decisions holding that the statutory provisions here in question, and the loan and grant agreements pursuant thereto, do not invade the reserved powers of the State, have been amply

vindicated by the recent decision of this Court sustaining the Federal unemployment compensation tax and credit. *Steward Machine Co.* v. *Davis*, decided May 24, 1937, No. 837.

The charge that the States were coerced by the unemployment tax and credit, as the farmers were held to be by the Agricultural Adjustment Act in the *Butler* case, 297 U. S. 1, was strongly pressed in the *Steward* case, and was as strongly rejected:

> Who then is coerced through the operation of this statute? * * * * Not the state. Even now she does not offer a suggestion that in passing the unemployment law she was affected by the duress. * * * For all that appears she is satisfied with her choice, and would be sorely disappointed if it were now to be annulled. * * * There would be a strange irony, indeed, if her choice were now to be annulled on the basis of an assumed duress in the enactment of a statute which her courts have accepted as a true expression of her will. * * *

What was there said with respect to Alabama is precisely true here. Her legislature has specifically authorized the incurring of obligations to the United States for loans with which to construct public works. Alabama Acts, Extra Session, 1933, No. 107, Appendix, p. 52. And the Supreme Court of Alabama has expressly sustained such authorization. *Oppenheim* v. *City of Florence*, 229 Ala. 50.

The argument of coercion is even less tenable in the present case than in the *Steward* case. Here

the States and subdivisions are left entirely free to apply or not to apply for financial aid for public works. There is no element of competitive self-interest which makes it imperative for one State to match another in this respect, particularly since the receipt of a loan will entail a serious financial undertaking on the part of the borrower. But even if the availability of Federal funds for public works does constitute a strong incentive for the States to seek such funds, the important factor is that the choice of projects is left with the local applicant. Any inducement by reason of the Federal act is simply an encouragement to construct public works at the present time; it is not an inducement to construct a power plant rather than a schoolhouse or a city hall.

The unemployment tax and credit sustained in the *Steward* case operates, on the other hand, as a much more impelling inducement than the grant-in-aid provisions involved in the case at bar. Under the former plan the employers in a state must pay either a tax to the Federal Government or a contribution to a state fund for the relief and prevention of unemployment, and the economic self-interest of the state will naturally impel it to establish an approved unemployment compensation system in order that the inescapable burden imposed on its employers by the Federal Act may be applied to the advantage of the state itself. In fact, as the opinion of Mr. Justice Butler pointed out,

within a short time after the enactment of the Federal law 43 States passed appropriate unemployment compensation measures. Under the public works provisions of the 1933 Act, no involuntary burden whatever is imposed by the Federal Government. There is simply afforded to the state the choice of preserving the *status quo* or seeking the benefit of financial aid on terms which are meant to be attractive but which nevertheless entail the voluntary assumption of a financial obligation."

"This freedom of local choice is reflected in the results of local elections held in connection with proposed construction of Public Works projects. Out of 2,613 elections held on the question of borrowing funds as a condition of receiving a grant, 2,166, or about 83 percent, were carried, and 447, or about 17 percent, were defeated. In terms of votes cast, 5,837,456, or 58 percent, were in favor of the proposals, and 4,169,736, or 42 percent, opposed. In terms of the estimated cost of the projects, those in an amount of $364,011,878 were approved, and those in an amount of $98,448,257 were disapproved. Proposed Federal grants in the amount of $150,390,286 were approvad in these elections, while such grants in the amount of $44,090,570 were rejected. Hearing before Subcommittee of Committee on Appropriations, U. S. Senate, on H. R. 12624, May 18, 1936, p. 12 (testimony of Administrator).

Also significant in this connection is the fact that Iowa City, Iowa, after approval of its application for a grant, voluntarily withdrew its application as a result of subsequent local determination not to enter upon a municipal power undertaking. See the Resolution of the City Council of Iowa City filed in this Court with the stipulation of counsel that the cause had become moot.

It is unnecessary to labor the point, for the distinction was expressly recognized in the separate opinion of Mr. Justice Sutherland. Speaking for himself and Mr. Justice Van Devanter, he said (57 S. Ct., 901–902):

> An illustration of what I regard as permissible cooperation is to be found in Title I of the act now under consideration. By that title, federal appropriations for old-age assistance are authorized to be made to any state which shall have adopted a plan for old-age assistance, conforming to designated requirements. * * * so that we have simply the familiar case of federal aid upon conditions which the state, without surrendering any of its powers, may accept or not as it chooses. *Massachusetts* v. *Mellon,* 262 U. S. 447, 480, 482, 483.

What was said by Mr. Justice Sutherland in *Massachusetts* v. *Mellon,* cited in the foregoing quotation, is particularly applicable here (262 U. S. at 482, 483):

> Nor does the statute require the States to do or to yield anything. If Congress enacted it with the ulterior purpose of tempting them to yield, that purpose may be effectively frustrated by the simple expedient of not yielding.
>
> In the last analysis, the complaint of the plaintiff State is brought to the naked contention that Congress has usurped the reserved powers of the several States by the

> mere enactment of the statute, though nothing has been done and nothing is to be done without their consent; * * *.

The system of Federal grants in aid is one which has been recognized for over a century as a salutary and appropriate method, within the framework of our constitutional division of powers, for the exercise of Federal functions in cooperation with those of the states. This practice has persuasive force. As was said by the Chief Justice in *McCulloch* v. *Maryland,* 4 Wheat. 316, 401:

> this can scarcely be considered as an open question, entirely unprejudiced by the former proceedings of the nation respecting it. The principle now contested was introduced at a very early period of our history, has been recognized by many successive legislatures, and has been acted upon by the judicial department, in cases of peculiar delicacy, as a law of undoubted obligation.

The very first Congress in 1790 enacted the well-known Assumption Act (1 Stat. 138, 142) under which the Federal Government assumed the debts of the States incurred during the Revolution. The Act was sponsored by Alexander Hamilton (American State Papers, Finance, Vol. I, pp. 15–25). In 1836 Congress provided (5 Stat. 52, 55) that the surplus in the Treasury in excess of $5,000,000 should be deposited with the States, subject to their individual assent, under an agreement to repay

upon stated notice by the Secretary of the Treasury. In 1841 Congress provided (5 Stat. 453, 455) that the net proceeds of the sales of public lands should be divided among certain States; and further that 500,000 acres of public land should be donated to each of the nine States and a similar amount to each new State admitted to the Union. Section 9 of the Act provided that the lands so received by the States should not be disposed of at a price less than $1.25 per acre, and that the proceeds should be faithfully applied to objects of internal improvements, "namely, roads, railways, bridges, canals and improvement of watercourses, and drainage of swamps."

Beginning in 1803 (2 Stat. 225) lands were regularly granted to the States upon admission to the Union for the use of schools in the State. Every State, except the 13 original members of the Union and 5 others, has received such Federal grants for common schools.[49] A total of 77,510,737 acres were thus granted by the Federal Government.[50] Similarly, extensive grants of land were made by the Federal Government to the States for universities, seminaries of learning, and normal schools. The grants for these purposes aggregated 3,987,954 acres.[51]

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[49] *Digest of Legislation Providing Federal Subsidies for Education*, U. S. Department of Interior, Office of Education, Bulletin No. 8, 1930, pp. 3–4.

[50] *Idem*, p. 15. This figure does not include the grant to the Territory of Alaska.

[51] *Idem*, p. 23.

In 1862 the first Morrill Act (12 Stat. 503) granted 30,000 acres to each State for each Senator and Representative, according to the apportionment of 1860. Each State was required to select the land within its own limits, but in case of a deficiency the Secretary of the Interior was to issue land scrip for the balance, such scrip to be sold by the state and the proceeds applied to the purpose of the Act. Numerous restrictions were placed upon the uses and maintenance of the fund. The interest was to be devoted to the "endowment support, and maintenance of at least one college where the leading object shall be, without excluding other scientific and classical studies, and including military tactics, to teach such branches of learning as are related to agriculture and the mechanic arts * * *." Ninety per cent of the money derived from the sale of land scrip was to be invested in stocks of the United States or of the states or in other safe stocks, bearing interest at not less than 5 per cent. The remaining 10 per cent of the funds might be used for the purchase of experimental farms and sites for buildings. Annual reports to Congress were required. In 1866 the benefits of the Act were made applicable generally to future states (14 Stat. 208). Every State has a land grant college. See *Hamilton* v. *Regents,* 293 U. S. 245, 259, note 3.

Congress has by no means confined its grants to land and land scrip. Grants of Federal funds have been made regularly to the states for purposes of education (including agricultural experimentation), public health, highway construction, forest protection, and other purposes.

Education. In 1887 the so-called Hatch Act (24 Stat. 440) authorized appropriations for agricultural experiment stations in connection with the colleges established pursuant to the Morrill Act of 1862. The subjects of research and experiment were carefully enumerated. For the first year authority was conferred to use 20 per cent of the amount of the grants for erecting buildings necessary for experimental work, and thereafter 5 per cent of the grants could be thus used. In 1906 the Adams Act (34 Stat. 63) provided for increased appropriations for the agricultural experiment stations. The fund was to be applied only to paying necessary expenses of conducting research or experiments bearing upon the agricultural industry of the United States. Annual reports to the Secretary of Agriculture and the Secretary of the Treasury were required. In 1925 (43 Stat. 970) additional amounts were authorized to be appropriated annually. Under these acts the agricultural and experiment stations have received, from 1888 to 1929, a total of $52,770,914.65.[52]

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[52] *Idem*, pp. 32–33.

In addition to the appropriations for agricultural experiment stations, the colleges established pursuant to the Morrill Act of 1862 have anually received substantial amounts from the Federal Government. The second Morrill Act in 1890 (26 Stat. 417) provided an additional annual appropriation. The Act prohibited payment of any appropriation to any college where distinction of race or color is made in the admission of students, but allowed funds for the establishment and maintenance of separate colleges for white and colored students. Further appropriations were authorized in 1907 (34 Stat. 1256). These appropriations under the second Morrill Act and the Act of 1907 have aggregated, for a period, 1890 to 1930, $74,202,000. Cf. *Hamilton* v. *Regents,* 293 U. S. 245, 259.

Still further appropriations have been regularly made to provide for cooperative agricultural extension work in the land grant colleges. The Smith-Lever Act of 1914 (38 Stat. 372) appropriated funds for such work to be carried on in a manner mutually agreed upon by the Secretary of Agriculture and the agricultural college. This Act required the States to contribute equally with the Federal Government in order to secure the benefits of the Act. Among the requirements imposed was a provision that not more than 5 per cent of each annual grant shall be applied to the printing and

distribution of publications. Supplementary appropriations were authorized in 1928 (45 Stat. 711) with the provision that 90 per cent thereof should be utilized for payment of salaries of county extension agents. Under these acts the appropriations for cooperative agricultural and home economic extension work have aggregated, for the period 1914 to 1930, $73,145,872.[53]

For the year 1930 alone the total appropriation for land grant colleges, agricultural experiment stations, and cooperative extension work was $14,712,936.[54]

Federal grants in large amounts have also been made to the States for the purpose of vocational education. The Smith-Hughes Act of 1917 (39 Stat. 929) authorized grants to the states subject to the acceptance by their legislatures of the prescribed terms which included, among other things, the creation of a state board, the submission of plans to the Federal board for vocational education, the establishment of teaching qualifications approved by the Federal board, the provision of suitable buildings and equipment, and the expenditure by the state or local community, or both, of an equal amount for the maintenance of training of teachers. The appropriations under this Act, from 1918 to 1934, aggregated $104,000,000.[55]

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[53] *Idem*, p. 340.
[54] *Ibid.*
[55] *Idem*, p. 39.

Forest-fire prevention.—In 1911 Congress appropriated $200,000 to be expended by the Secretary of Agriculture in cooperation with any state or states in protection from fire of the forested watersheds of navigable streams. Act of March 1, 1911 (c. 186, 36 Stat. 961). The state was eligible to receive this Federal aid after it had established a system of fire protection and had appropriated a sum as large as the Federal grant. The money was to be spent by the state officials, subject to Federal approval. The original grant was soon expended and yearly appropriations of $100,000 were made by Congress until 1920, when the annual subsidy was raised to $125,000, and in 1921 to $400,000.[56] Up to 1924 Congress had limited the use of such funds to the protection of the forested watersheds of navigable streams, but in 1924 the Clarke-McNary law authorized an appropriation to be used in cooperation with States for the protection from fire of all forest lands, private or government owned, within or without watersheds, with the provision that the amount expended should not exceed the expenditure of the State. Act of June 7, 1924, c. 348, 43 Stat. 653. Thirty-three States have accepted Federal benefits under the Clarke-McNary law.[57]

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[56]Act of March 4, 1917, c. 179, 39 Stat. 1134, 1166; Act of October 1, 1918, c. 178, 40 Stat. 973, 1005; Act of July 24, 1919, c. 26, 41 Stat. 234, 268; Act of May 31, 1920, c. 217, 41 Stat. 694, 728; Act of March 3, 1921, c. 127, 41 Stat. 1315, 1344.

[57]A. F. Macdonald, *Federal Aid* (1928), p. 43.

Highways.—Federal grants to States for the construction of highways are a familiar type of Federal aid. Since the Act of July 11, 1916, c. 241, 39 Stat. 355, constantly increasing appropriations have been made.[58] Under these Acts the expenditure of the Federal Government was limited to 50 per cent of the estimated cost of the approved projects, and the construction work was to be done under the supervision of the states but subject to the inspection and approval of the Secretary of Agriculture.

Discussing the Federal-aid highway legislation in *Nashville, C. & St. L. Ry.* v. *Walters,* 294 U. S. 405, 417, 418–419, this Court said:

> The relief of the unemployment incident to the business depression has been the main incentive for highway construction since April 4, 1930—the period in which the highway here in question was undertaken and completed.
>
> To achieve its purposes, the Federal Government has made large contributions to the cost of the Federal-aid highway system. * * * *It has, since the depression, given to the several States emergency grants to be*

[58] See e. g., Act of July 11, 1916, c. 241, 39 Stat. 355; Act of February 28, 1919, c. 69, 40 Stat. 1189, 1200–1201; Act of November 9, 1921, c. 119, 42 Stat. 212; Act of June 19, 1922, c. 227, 42 Stat. 652, 660; Act of January 22, 1923, c. 29, 42 Stat. 1154, 1157; Act of February 26, 1923, c. 119, 42 Stat. 1289, 1321; Act of February 12, 1925, c. 219, 43 Stat. 889, Sec. 1.

expended in highway ...ruction for the relief of unemployment. [Italics supplied.]

Vocational rehabilitation.—Beginning with the Act of June 2, 1920, Congress has made an annual appropriation, of $1,000,000 since 1924, to the States for the promotion of vocational rehabilitation of persons disabled in industry or in any other legitimate occupation, on the condition that the States expend at least equal sums and meet certain Federal requirements, including a requirement that none of the funds be used for buildings."

Health and hygiene.—The Sheppard-Towner Act of November 23, 1921, c. 135, 42 Stat. 224, Sec. 2, provided for a state subsidy of $1,240,000 annually "for the promotion of the welfare and hygiene of maternity and infancy." This was to be apportioned among such of the several states as should accept and comply with its provisions, including the condition that the payments to any state should not be made until the state had appropriated an equal amount. This was the Act involved in *Massachusets* v. *Mellon,* 262 U. S. 447.

In view of this background of Federal grants-in-aid, and the decision in the *Steward* case, *supra,* we submit that the validity of the statutory provisions for loans and grants, as against the charge

"Act of June 2, 1920, c. 219, 41 Stat. 135, 136, Secs. 1–4, as amended by the Act of June 5, 1924, c. 265, 43 Stat. 430, 431, and Act of June 30, 1932, c. 324, 47 Stat. 448, 449. For other examples of Federal-State cooperation, see U. S. Daily, August 14, 1928, p. 4.

of violation of the Tenth Amendment, has been put beyond the realm of debate.

The fact that the result of the loan and grant will be competition raises no constitutional question. The resulting competition will be that of the cities and not of the Federal Government. And in any event, such collateral consequences do not affect the validity of the Federal action even though they might not alone justify it. *Sonzinsky* v. *United States,* 300 U. S. 506.

There is nothing in the loan and grant agreements themselves which constitutes an invasion of the powers of the State. Apparently petitioner so concedes. The agreements provide in Section 13 that there are no other agreements or undertakings between the cities and the Federal Government save those therein contained. The position of the Federal Government under the agreements may be succinctly described as that of a bondholder possessing only the rights conferred by the laws of the state upon any holder of such bonds. Specific provision to that effect is found in Section 13 of the agreements.[60] The state remains free to pursue its own policy respecting the regulation of utility

[60] The fact that the bonds are payable solely out of the revenues of the project does not affect the status of the Federal Government in relation to the project. Revenue bonds are a well-recognized form of security issued by public bodies and held by institutional and other investors. *Cf. Puget Sound Co.* v. *Seattle*, 291 U. S. 619, 631 (Opinion of Van Devanter, J., concurring); see Public Works Administration, *Revenue Bond Financing* (1936).

rates and service.[61] The only restriction on the State's power is that the limited rights of bondholders granted by existing state law must not be destroyed; and this restriction is founded not upon any requirement imposed by Congress or the Administrator but upon Section 10 of Article 1 of the Federal Constitution itself.

If there is any interference with the reserved powers of the states, or with local self-government, it is properly attributable, we submit, not to Congress or to the Administrator, but to the petitioner, which seeks to prevent the state and its municipalities from carrying out an undertaking which they have freely determined upon and in which they have an admitted constitutional right to engage.

VI

The Alleged Improper Policy or Nonstatutory Standard or Criterion Ascribed to the Administrator Cannot Invalidate His Acts

As noted *supra,* pages 14 to 54, it is not open to petitioner to assert that the Administrator had

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[61] It is thus unnecessary to consider in the present cases the question whether the inclusion of a provision in the agreements with respect to resale rates would be valid. It may be noted that such a provision would not constitute an invalid delegation of the legislative powers of the cities, under the decisions of state courts. *Clarke* v. *South Carolina Public Service Authority*, 177 S. C. 427; *Thomas* v. *McHugh*, 256 N. W. 763, 767–769 (N. D. 1934); *Marin Water & Power Co.* v. *Sausalito*, 168 Calif. 587, 143 Pac. 767; *Bell* v. *City of Fayette*, 28 S. W. (2d) 356, 359, 362.

any improper policy or applied any improper or nonstatutory standard or criterion in making the loan and grant agreements, because the trial court has made express findings to the contrary, and petitioner has assigned no error in this court as to the correctness of those findings; and, moreover, petitioner cannot show that those findings are not amply supported by the evidence.

Petitioner has endeavored to maintain that in carrying out the statute the Administrator has made loans and grants for local electric projects for the purpose solely of reducing rates to consumers and "regulating" the rates of private companies; that if the statute had so provided it would be unconstitutional; and that therefore the Administrator's action is itself unconstitutional. The conclusive answer is that the District Court found, and the record shows, that such has not been the Administrator's interpretation of the statute. The administration of the statute, as already shown, has been in accordance with the intention of Congress that neither a municipal power project nor any other municipal project should be rejected merely because it is competitive with an existing private enterprise. The fact that in carrying out the statute the Administrator was necessarily aware of its consequences cannot affect the validity of his action.

Even if we were to assume, however, that the findings of the District Court are in error, and that

petitioner has not waived its right to assail the findings, we submit that the alleged application by the Administrator of an improper or non-statutory standard or criterion would in any event be irrelevant.

In the first place, as pointed out above (pp. 14 to 15) petitioner, by its own arguments, discloses that irrelevance, for in its brief and throughout this litigation it has insisted that the threatened financial loss to it is the inevitable (but incidental) consequence of the making of any loan and grant, pursuant to the statute, to these cities for the construction of competing power projects. In short, petitioner asserts—and it is a fact—that if the Administrator has complied with the statute and has not applied the alleged additional improper policy or standard, the consequences to petitioner will be exactly the same.

Aside from the failure of proof as to the improper purposes of the Administrator and the findings of the District Court in that regard, and aside from the irrelevance of that element as a matter of fact, it is also irrelevant as a matter of law. If, as we have shown, the loans and grants in the cases at bar are authorized by the statutes and the statutes themselves are constitutional, the alleged improper purpose or standard of the Administrator cannot serve to render invalid either the statute or the action taken thereunder. This Court has repeatedly held that where an officer is

acting in the exercise of executive powers conferred upon him by a valid statute, and where his action, viewed objectively, is in conformity with the statute, the reasons for his action cannot be made the subject of judicial inquiry.

Thus in *Dakota Central Telephone Co.* v. *South Dakota*, 250 U. S. 163, where the President had taken possession of telephone companies under a statute enacted pursuant to the war power, it was argued that his action was unlawful and unconstitutional, as the war had virtually ended, and as therefore the action was not taken for the purpose of prosecuting the war but for the unlawful and non-statutory purpose of regulating intrastate telephone rates. (See argument, 250 U. S. at 177.) In disposing of that contention, the Court, speaking through Chief Justice White, said (p. 184):

> The proposition that the President in exercising the power exceeded the authority given him is based upon two considerations. First, because there was nothing in the conditions at the time the power was exercised which justified the calling into play of the authority; indeed, the contention goes further and *assails the motives which it is asserted induced the exercise of the power.* But as the contention at best concerns not a want of power, but a mere excess or abuse of discretion in exerting a power given, it is clear that it involves considerations which are beyond the reach of judicial power. This must be since, as this court has often pointed out, the judicial may not invade the

> legislative or executive departments so as to correct alleged mistakes or wrongs arising from asserted abuse of discretion. [Italics supplied.]

In *Isbrandtsen-Moller Co.* v. *United States,* 300 U. S. 139, the appellant charged that an order of the Secretary of Commerce, acting as successor to the Shipping Board, requiring the disclosure of information as to rates and charges, "was issued pursuant to a concerted plan" of the defendant officers to compel the appellant to become part of a shipping monopoly, and that therefore any provision of law purporting to authorize the order was in violation of the Fourth and Fifth Amendments to the Constitution.[62] This contention, which is

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[62] The pertinent allegation of the bill of complaint in that case is so strikingly similar in form to the charges made in the present case that we reprint the allegation here (Record in U. S. Supreme Court, p. 14).

"On information and belief, said order of November 18, 1935, was issued pursuant to a concerted plan of the defendants to compel complainant and any other independent or non-conference carriers to become part of steamship conferences or the shipping monopoly or a contemplated unified system of transportation by all common carriers by water in the foreign commerce of the United States, and was issued at the request of certain of complainant's competitors to compel the complainant, which is an independent, unsubsidized, non-conference line, either to join a conference or shipping monopoly, which it could not lawfully be compelled to join, or else to suffer serious damage to, if not complete destruction of, its business from the disclosure to its competitors, members of conferences, or shipping monopoly, of its private business records and rates charged and commodities moved by it. The complainant is informed and verily believes, and therefore alleges, that *any provision of law purporting to*

similar in all respects to that argued in the case at bar, was rejected by a unanimous Court, speaking through Mr. Justice Roberts, on "the principle that if the order is justified by a lawful purpose, it is not rendered illegal by some other motive in the mind of the officer issuing it" (p. 145). The Court cited *Dakota Central Telephone Co.* v. *South Dakota,* 250 U. S. 163, 184; *Philadelphia & Trenton Railroad Co.* v. *Stimpson,* 14 Pet. 448, 458, 459; *United States* v. *Chemical Foundation,* 272 U. S. 1, 14, 15.

The precise argument made by petitioner was rejected by this Court when it was advanced by its stockholders in *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288. There it was argued, *inter alia,* that, even if the statute in itself was constitutional, the conduct of the directors of the Authority, in making the contract there involved, was invalid because it was based upon the very "national power policy" which petitioner in the case at bar ascribed to the Administrator (R. I, 489, 171), and that that policy made the acts of the Authority violative of the statute, and also unconstitutional. That argument, which was rejected by eight members of this Court, will be found set forth, almost *in haec verba,* in the brief filed in this Court by the unsuccessful plaintiffs in the *Ashwander* case, and in the dissenting opinion in

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authorize the issuance of said order for said purposes would be a nullity, being violative of the provisions of the Fourth and Fifth Amendments to the Constitution of the United States." [Italics supplied.]

that case. The opinion of the majority of the court emphasized the principle that, when a statute itself is valid, the constitutionality of official action must be tested by looking to the action itself—to see whether it complies with the provisions of the valid statute—and not by judging the policies or motives or pronouncements on the part of the administrative officers.

See also *Anicker* v. *Gunsburg,* 246 U. S. 110, 120; *DeCambra* v. *Rogers,* 189 U. S. 119, 122; *Louisiana* v. *McAdoo,* 234 U. S. 627, 633; *West* v. *Hitchcock,* 205 U. S. 80, 85–86.

The authorities cited by petitioner deal with fundamentally different situations. In all the cases cited by petitioner (Brief, pp. 65–66) the defendant officers had *refused* to act in the manner required by the statute, in the mistaken belief that they had no power to act, or that the statute gave them discretion not to act. And accordingly the court required the officers to take action in accordance with the statute properly interpreted—and not, as petitioner's argument implies, to prevent action by the officer which is authorized by the statute. Typical is *Herkness* v. *Irion,* 278 U. S. 92, where a State officer refused to issue a license to plaintiff, on the basis of a nonstatutory rule. To like effect are the several Interstate Commerce Commission cases cited by petitioner, such as *Interstate Commerce Commission* v. *United States ex rel. Humboldt Steamship*

Co., 224 U. S. 474, where the Commission, through a misinterpretation of the statute, refused to take jurisdiction and this Court ordered it to assume jurisdiction and to exercise its discretion.

Arguing the same point, petitioner in the *Duke Power Co.* case cites *Southern Pacific Co.* v. *Interstate Commerce Commission*, 219 U. S. 433, in support of its position and as if that case were contrary to the *Dakota Telephone* and *Isbrandtsen-Moller* cases, *supra*. If there were any inconsistency between the *Southern Pacific* case and these cases, the former must be deemed to have been overruled. But there is no such discrepancy, for the latter cases related to "executive conduct." (See *United States* v. *Baltimore & Ohio Railroad Co.*, 293 U. S. 454, 465, note 9, and cases there cited; *Morgan* v. *United States*, 298 U. S. 468, 479). The *Southern Pacific* case, on the other hand, related to the regulatory powers of the Interstate Commerce Commission acting pursuant to a statute which requires the Commission to act upon the basis of record evidence and upon findings. More important, in the *Southern Pacific* case this Court found, from the face of the order of the Commission, the Commission's opinion, and the official syllabus of that opinion, that the Commission was not complying with the statutory requirements (as is the Administrator in the case at bar) but was ignoring the statutory bases for action by it and was acting solely upon the basis of a criterion not authorized by or found in the statute.

Atchison, T. & S. F. Ry. Co. v. *Interstate Commerce Commission,* 190 Fed. 591 (decided by the Commerce Court), involved merely an application of the rule of the *Southern Pacific* case where conduct of the Commission was involved. *Anchor Coal Co.* v. *United States,* 25 F. (2d) 462, S. D. W. Va., was of like character. Subsequently the Circuit Court of Appeals for the Fourth Circuit, in *Appalachian Electric Power Co.* v. *Smith,* 67 F. (2d) 451, 454, said, "The allegations and prayers of the bill which relate to the abuse of authority by the Commission need not be considered; for it is clear that it is only on the allegations of want of statutory or constitutional authority that the suit against the Commissioners as individuals could under any theory be sustained." And in its most recent opinion in the *Duke* case, 91 Fed. (2d) 665, at 675, 676 (C. C. A. 4), the same court said that

> even if the Administrator have the motive attributed to him by plaintiff, and even if this be an improper motive, the validity of his action is not affected thereby. Equity will restrain where there is lack of power on the part of a public officer, not where there is mere abuse of power in doing from a wrong motive or to accomplish an ulterior purpose that which the law authorizes. To grant injunction in the latter case would be for the courts to control the executive in the exercise of executive discretion, a thing which under our tripartate form of government they have no power to do. * * *

> The fact that the competition which will result from the project may have some effect upon plaintiff's rates cannot affect the validity of the action of the Administrator any more than his motives. It is true, of course, that neither Congress nor the Administrator may do something which they are forbidden to do by calling it something else; but the exercise of a granted power is not rendered unlawful by reason of its incidental effects. (Citing *Sonzinsky* v. *United States,* and *Magnano Co.* v. *Hamilton, supra.*)

There is, to be sure, a limited class of cases in which the action of an officer, though taken pursuant to a valid statute and in conformity therewith, may nevertheless be held invalid. In those cases the gravamen of the complaint is that the officer, in administering the statute, has systematically discriminated against one person or group in favor of others similarly situated, and his action therefore denies to the complainant the equal protection of the laws or due process of law. In such a case the officer's action itself is unconstitutional because, though authorized with respect to the complainant, it was deliberately not so taken with respect to others. *Cumberland Coal Co.* v. *Board of Revision,* 284 U. S. 23, 28–30; Cf. *Norris* v. *Alabama,* 294 U. S. 587. Even in such cases it is the action of the officer, objectively viewed, which is the subject of inquiry. It is enough to say that no such complaint of unlawful discrimination is made in the cases at bar.

CONCLUSION

For the foregoing reasons, the decree of the Court of Appeals, affirming that of the District Court, should be affirmed.

Respectfully submitted.

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